Docket for 04-169

(13)

No. 04-169
Title: Graham County Soil & Water Conservation District, et al., Petitioners
v.
United States, ex rel. Karen T. Wilson
Docketed: August 5, 2004
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (03-1122)
Decision Date: April 29, 2004
Rehearing Denied: June 28, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jul 28 2004	Petition for a writ of certiorari filed. (Response due September 7, 2004)
Aug 31 2004	Waiver of right of respondent United States, ex rel. Karen T. Wilson to respond filed.
Sep 8 2004	DISTRIBUTED for Conference of September 27, 2004.
Sep 13 2004	Response Requested . (Due October 13, 2004)
Oct 7 2004	Order extending time to file response to petition to and including November 12, 2004.
Nov 12 2004	Order further extending time to file response to petition to and including November 19, 2004.
Nov 19 2004	Brief of respondent United States, ex rel. Karen T. Wilson in opposition filed.
Dec 1 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Petition GRANTED.
Feb 18 2005	Brief amicus curiae of National Defense Industrial Association, et al. filed.
Feb 22 2005	SET FOR ARGUMENT ON Wednesday, April 20, 2005.
Feb 22 2005	Joint appendix filed.
Feb 22 2005	Brief of petitioners Graham County Soil & Water Conservation District, et al. filed.
Feb 22 2005	Brief amici curiae of Equal Employment Advisory Council and Chamber of Commerce of the United States filed.
Feb 22 2005	Brief amici curiae of International Municipal Lawyers Association and National League of Cities filed.
Feb 22 2005	Brief amicus curiae of National Workrights Institute filed.
Mar 10 2005	Record received from U.S.C.A. 4th Circuit. (1 envelope)
Mar 17 2005	Record received from U.S.D.C. for District of North Carolina. (1 box)
Mar 24 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 25 2005	CIRCULATED.
Mar 29 2005	Brief amicus curiae of United States filed. (Distributed)
Mar 29 2005	Brief of respondent. Karen T. Wilson filed. (Distributed)
Mar 29 2005	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)
Apr 4 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 12 2005	Reply of petitioners Graham County Soil & Water Conservation District, et al. filed. (Distributed)

Apr 20 2005	Argued. For petitioners: Christopher G. Browning, Jr., Solicitor General, Raleigh, N.C. For respondent: Mark Hurt, Abington, Va; and Douglas Hallward-Driemeier, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

Supreme Court, U.S.
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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,
Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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July 28, 2004

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QUESTION PRESENTED

WHETHER THE SIX YEAR LIMITATION PERIOD SET OUT IN 31 U.S.C. § 3731(b) SHOULD BE APPLIED TO RETALIATORY DISCHARGE ACTIONS UNDER THE FALSE CLAIMS ACT OR WHETHER COURTS SHOULD APPLY THE MOST CLOSELY ANALOGOUS STATE LIMITATION PERIOD.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the court of appeals were as follows:

United States of America ex rel. Karen T. Wilson was the plaintiff-appellant in the court of appeals.

Graham County Soil & Water Conservation District, Cherokee County Soil & Water Conservation District, Gerald Phillips, Allen DeHart, Lloyd Millsaps, Bill Tipton, C.B. Newton, and Eddie Wood were defendant-appellees in the court of appeals and are the parties petitioning for certiorari.

Raymond Williams, Dale Wiggins, Lynn Cody, Graham County were defendant-appellees in the court of appeals and are not petitioning for certiorari.

Richard Greene, William Timpson, Keith Orr, Jerry Williams, Billy Brown, were listed in the caption of the court of appeals as defendant-appellees, but did not file notice of appearance, join the brief of the appellees or participate in the appeal and are not petitioning for certiorari.

Graham County Board of County Commissioners, Cherokee County Board of County Commissioners, Cherie Greene, Ricky Stiles, Betty Jean Orr, Joyce Lane, Jimmy Orr, Eugene Morrow, Charles Lane, Charles Laney, George Postell, Lloyd Kissleburg, Ted Orr, Bernice Orr, John Doe, John Doe Corporations, and defendant, Government Entities 1-99 were

defendants in the district court but did not participate in the court of appeals proceedings.

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Graham County Soil & Water Conservation District, Cherokee Soil & Water Conservation District, Bill Tipton, Eddie Wood, C.B. Newton, Gerald Phillips, Allen DeHart and Lloyd Millsaps respectfully petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a) is reported at *United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004). The order denying rehearing is unreported (Pet. App. 122a-123a). The district court's opinion granting Defendants' motion to dismiss is not reported (Pet. App. 46a-71a). The district court's denial of Plaintiff's motion for reconsideration and the district court's certification that the matter is ripe for review pursuant to 28 U.S.C. § 1292(b) is reported at 224 F. Supp. 2d 1042 (Pet. App. 72a-88a). The Memorandum and Recommendation of the United States Magistrate Judge is unreported (Pet. App. 89a-121a).

JURISDICTION

The Court of Appeals entered its judgment on April 29, 2004 (Pet. App. 1a-41a) and rehearing was denied on June 28, 2004 (Pet. App. 122a-123a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the False Claims Act, 31 U.S.C. §§ 3729-3733. The False Claims Act is set out in Petitioners' Appendix at 124a-158a.

STATEMENT OF THE CASE

On March 7, 1997, Plaintiff Karen T. Wilson (hereinafter "Wilson") resigned as a secretary at the Graham County Soil & Water Conservation District. Over three years and ten months later, Wilson filed the present action. Wilson alleges that she was harassed by Petitioners for exposing various false claims for reimbursement made to certain federally funded programs. Specifically, she claims that Petitioners retaliated against her in violation of 31 U.S.C. § 3730(h) of the False Claims Act. The jurisdiction of the District Court was based upon 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331.

Petitioners moved to dismiss Wilson's retaliatory discharge claim in that it was barred by the applicable limitation period (three years under North Carolina law). The District Court agreed that Wilson's retaliatory discharge claim was time barred and dismissed this claim. On April 29, 2004, a divided panel of the Fourth Circuit reversed the District Court. The panel concluded that claims under 31 U.S.C. § 3730(h) are governed by the limitation period set out in 31 U.S.C. § 3731(b)(1) (a six-year period). The Fourth Circuit opinions focuses upon the language of 31 U.S.C. § 3731(b) which provides:

> A civil action under section 3730 may not be brought - -

> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b) (2004). The Fourth Circuit noted that Section 3730, creates three separate causes of action. 367 F.3d at 248 (Pet. App. 5a). Section 3730(a) creates a cause of action that may be brought by the Attorney General when the Government has been damaged by a false claim. Section 3730(b) provides for the filing of a qui tam action by an individual. Section 3730(h) creates a cause of action for retaliatory discharge when an employee has been discriminated against for pursuing a false claim action. As the Fourth Circuit noted, Section 3729 "creates and defines the parameters of liability for presenting a false claim to the Government." 367 F.3d at 248 (Pet. App. 5a).

Relying upon the language of these sections, the Fourth Circuit concluded that Congress intended to bar any retaliatory discharge claim that is not brought within six years from the date the false claim was submitted to the Government: "[T]he effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under

§ 3730(h), may be brought no more than six years after the date on which the underlying violation was committed." 367 F.3d at 248 (Pet. App. 5a-6a). Recognizing that this issue has "divided both our sister circuits and courts within this circuit," the Fourth Circuit rejected the rationale of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). 367 F.3d at 249 (Pet. App. 8a). In *Lujan*, the Ninth Circuit concluded that 31 U.S.C. § 3731(b) does not provide a limitation period for retaliatory discharge claims, because the limitation period in this section only addresses violations of Section 3729 and Section 3729 has no bearing upon retaliatory discharge actions. In its decision, the Fourth Circuit expressly rejected the Ninth Circuit's decision and instead adopted the rationale of the Seventh Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994).

Noting that this issue was difficult and divisive, Judge Wilkinson dissented. In his dissent, he reasoned that the Fourth Circuit's opinion cannot be squared with the literal language of the False Claims Act and is not consistent with Congressional intent. Moreover, he concluded that the majority's decision "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." 367 F.3d at 257 (Wilkinson, J., dissenting) (Pet. App. 28a-29a).

REASONS FOR GRANTING THE PETITION

This petition provides the Court with an opportunity to resolve a split among the circuit courts as to the appropriate limitations period for retaliatory discharge actions under the False Claims Act. In the absence of a ruling by this Court,

employers and employees will face uncertainty and inconsistent outcomes as to what limitation period governs. Given the breadth and magnitude of litigation arising under the False Claims Act, the resolution of this issue is important to the Government, Government contractors and employees throughout the Country. The petition should be granted in order to resolve this significant issue and to correct the erroneous decision of the Fourth Circuit.

I. THE FOURTH CIRCUIT'S DECISION DEEPENS AN EXISTING CONFLICT AMONG THE CIRCUIT COURTS.

In holding that a six year limitation period applies to retaliatory discharge actions under the False Claims Act, the Fourth Circuit expressly disagreed with the decision of the Ninth Circuit in *Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998) (applying most closely analogous state limitation period). In doing so, the Fourth Circuit has joined the Third and Seventh Circuit on this issue. Thus, four separate circuit courts have now addressed whether a six year statute of limitations or the most analogous state statute of limitation should be applied to retaliatory discharge actions under the False Claims Act. *United States of America ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004); *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003), *cert. denied*, 158 L. Ed. 2d 469 (2004); *Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998); *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994). The division that exists among the circuit courts is unlikely to be resolved in the absence of a ruling by this Court. As Judge Wilkinson noted in

his dissent, "This is not an easy case, and there exists a square conflict between the [circuit courts]." 367 F.3d at 257 (Pet. App. 28a); *Grand ex rel. United States v. Northrop Corp.*, 811 F. Supp. 333, 336 (S.D. Ohio 1992) (noting that this is a "difficult issue"). Numerous commentators have also recognized that given the split among the circuits and the various arguments that have been made on both sides, the ultimate resolution of this issue is far from clear. *See, e.g.*, J. Boese, Civil False Claims and Qui Tam Actions § 4.11[A], at 4-204 (Supp. 2000).

On the one hand, the Ninth Circuit has held that because the False Claims Act does not provide for a specific limitation period with respect to retaliation claims, courts must apply the most closely analogous statute of limitations under state law. *Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). In *Lujan*, the plaintiff relied upon the language of 31 U.S.C. § 3731(b)(1) which states that "a civil action under section 3730" may be brought within six years of the date "on which the violation of section 3729 is committed." The plaintiff argued that because the retaliatory discharge provision is set out in 31 U.S.C. § 3730(h) and this subsection is within Section 3730, a six year period must be applied to retaliation claims. The Ninth Circuit rejected this reading of 31 U.S.C. § 3731(b)(1), noting that "[t]he answer is not so simple." 162 F.3d at 1034.

The Ninth Circuit concluded that the language and legislative history of the False Claims Act demonstrates that Congress did not intend for a six year limitation period to apply to retaliation claims. The Ninth Circuit noted that prior to 1986, when Congress first added a retaliatory discharge provision to the False Claims Act, Section 3731(b) provided that a "'civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed.'" 162 F.3d at

1034 (quoting 31 U.S.C.A. § 3731(b) (West 1983)). When the retaliatory discharge provision was added in 1986, Section 3731(b) was changed so as to tie the six years to the date "'the violation of section 3729 is committed.'" *Id.* (quoting 31 U.S.C.A. § 3731(b)(1) (West Supp. 1998)). Because Section 3729 relates solely to substantive violations of the False Claims Act and does not address retaliation, the Ninth Circuit concluded that Congress did not intend to apply a six year period to retaliation claims:

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 amendments to the [False Claims Act]. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.
>
> That Congress was specifically concerned with false claims in its 1986 amendments to the statute of limitations is further illustrated by its addition of section 3731(b)(2). This section provides an alternative to the six-year statute of limitations for false claims, namely a period of no more than three years after material facts should have been known by the relevant government official, but never longer than ten years after the violation was committed. 31 U.S.C. § 3731(b). The legislative history to this

section indicates that this change was enacted to "ensure the Government's rights are not lost through a wrongdoer's successful deception," because "fraud is, by nature, deceptive . . . ." S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

The same rationale is inapposite to a private claim for retaliation. There is nothing covert or deceptive about retaliation – the victim feels its sting immediately. In the absence of some meaningful indication to the contrary, we must therefore presume that, in amending section 3731(b) so that the limitation runs only from the date of a violation of section 3729, Congress did not intend that the statute apply to section 3730(h).

> 162 F.3d at 1034.

On the other hand, the Seventh Circuit has rejected this rationale. In *Neal v. Honeywell, Inc.*, 33 F.3d 860 (7th Cir. 1994), the Seventh Circuit concluded:

> Section 3731(b)(1) allows six years to file suit under § 3730 from "the date on which the violation of § 3729 is committed." Section 3729 deals with making false claims. Neal filed this suit under § 3730 within six years of Honeywell's false claims. It is therefore timely.

Id. at 865. The Seventh Circuit proceeded to dismiss the employer's argument that such a statutory construction is

illogical because it could lead, in certain circumstances, to retaliatory discharge claims being time barred before they accrue. The Seventh Circuit reasoned that this six year period was akin to a statute of repose and therefore concluded that there was "no absurdity in the statute." *Id.*

In addition to the Seventh Circuit, the Third Circuit has held that a six year limitation period is to be applied to retaliatory discharge claims under the False Claims Act. *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003). In *Malloy,* however, the Third Circuit simply applied a six year limitation period without discussion of the issue. District courts in the Third Circuit have also applied a six year limitation period to retaliatory discharge actions under the False Claims Act. *See United States ex rel. Cantekin v. University of Pittsburgh,* 1997 U.S. Dist. LEXIS 22868 (W.D. Pa. 1997).

In the present action, the Fourth Circuit noted that the "proper interpretation of these provisions [of the False Claims Act] has divided both our sister circuits and courts within this circuit." 367 F.3d at 249 (Pet. App. 8a). The Fourth Circuit expressly rejected the rationale of the Ninth Circuit and adopted that of the Seventh Circuit. The Fourth Circuit concluded: "we find no ambiguity undermining the conclusion that Congress intended the revised limitation period of § 3731(b) to apply to all claims under § 3730, including retaliation claims under § 3730(h)." *Id.* at 250-51 (Pet. App. 9a-10a). In his dissent, Judge Wilkinson expressed his belief that the view of the Ninth Circuit's decision was the better reasoned approach: "In my judgment, the *Lujan* court advances the better interpretation of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000)." 367 F.3d at 257 (Wilkinson, J., dissenting) (Pet. App. 28a).

The Fourth Circuit's decision therefore deepens an existing split between the circuit courts. Review is warranted to resolve this conflict.

II. THE FOURTH CIRCUIT'S OPINION RAISES AN IMPORTANT ISSUE OF FEDERAL LAW

Whether courts should apply a six year statute of limitations to retaliatory discharge claims under the False Claims Act or the most closely analogous state law limitation period is an important question of federal law. Few, if any, statutes have had a greater impact upon how our Government does business with private contractors than the False Claims Act. During the past year alone, the United States recouped $2.1 billion from government contractors under the False Claims Act. Press Release, United States Department of Justice, Justice Dept. Civil Fraud (Nov. 10, 2003). This legislation has been appropriately described as "the most effective single law in history for individual whistleblowers to have an impact against corruption." Hearing on S. 1358 Before the Senate Gov't Affairs Comm., 108 Cong. (Nov. 12, 2003). Whether congressional intent is correctly applied by the courts with respect to the whistleblower protections created by this legislation has far-reaching impact upon the Government, private employers and employees who report fraud against the Government.

The question as to what limitations period Congress intended with respect to retaliatory discharge claims under the False Claims Act is a recurring issue. As set out above, federal courts have divided on the issue of whether a six year limitation period or analogous state law limitation periods should be

applied to retaliatory discharge claims brought under the False Claims Act. Although numerous courts have already ruled upon this issue, this issue will continue to arise in qui tam proceedings. Since 1986, when Congress adopted the retaliatory discharge provisions of the False Claims Act, over 4,000 actions have been filed by qui tam plaintiffs. Press Release, United States Department of Justice, Justice Dept. Recovers Over $1 Billion in FY 2002 (Dec. 16, 2002). The sheer number of qui tam actions (and resulting retaliatory discharge claims) before the federal courts ensures that this issue will be litigated and argued in federal courts throughout the Country until definitively resolved by this Court.

Moreover, this appeal has significant economic impact upon employers throughout the Country. Under the Fourth Circuit's opinion, an employee who is discharged in violation of 31 U.S.C. § 3730(h) may sit on his or her rights and wait to file a complaint until six years from the underlying False Claims Act violation. Given the fact that 31 U.S.C. § 3730(h) provides for double recovery of back pay, the effect of the Fourth Circuit's decision is to allow claimants to recover over twelve year's worth of salary by manipulating when a complaint is filed. In sharp contrast to 31 U.S.C. § 3730(h), on the numerous other occasions that Congress has enacted whistleblower protection, Congress has generally restricted the limitation period to two years or less.[1] When Congress has provided employees with a

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[1] *See* Federal Deposit Insurance Act, 12 U.S.C. § 1831j (two year limitation period); National Labor Relations Act, 29 U.S.C. §§ 158, 160 (six months); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (180 days); Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. § 1855 (180 days); Energy Reorganization Act, 42 U.S.C. § 5851 (180

remedy of reinstatement or back pay, Congress has consistently kept the limitation period short in order to offset the mounting back pay claims that employers and the Nation's economy would otherwise face. *See, e.g., Early v. Bankers Life & Casualty*, 959 F.2d 75, 80-81 (7th Cir. 1992) ("The short statutes of limitations in employment cases have a purpose - - both backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved - - and it is ill served when the employer does not receive prompt notice of the dispute."). The Fourth Circuit's opinion undermines congressional intent and imposes upon employers significant potential liability – far beyond the burden Congress intended for American employers to bear.

The Fourth Circuit's interpretation of 31 U.S.C. § 3730(h) also constitutes a significant departure from every other whistleblower statute enacted by Congress in that it ties the commencement of the limitation period to the underlying statutory violation rather than the date of the discharge. As Judge Wilkinson vehemently argued in his dissent:

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days); TSCA (asbestos), 15 U.S.C. § 2651 (90 days); Sarbanes-Oxley, 18 U.S.C. § 1514A (90 days); Aviation Investment and Reform Act, 49 U.S.C. §42121 (90 days); Safe Containers for International Cargo Act, 46 U.S.C. app. § 1506 (60 days); Federal Mine Safety and Health Act, 30 U.S.C. § 815 (60 days); Federal Surface Mining Act, 30 U.S.C. § 1293 (30 days); Clean Air Act, 42 U.S.C. § 7622 (30 days); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (30 days); Solid Waste Disposal Act, 42 U.S.C. § 6971 (30 days); Water Pollution Control Act, 33 U.S.C. § 1367 (30 days); CERCLA, 42 U.S.C. § 9610 (30 days); TSCA, 15 U.S.C. § 2622 (30 days); OSHA, 29 U.S.C. § 660 (30 days). On other occasions, Congress has declined to specifically adopt a limitation period. *See* ERISA, 29 U.S.C. § 1140.

The majority's interpretation is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts. By holding that the statute of limitations for anti-retaliation actions is set in motion by some independent event, rather than by the retaliatory acts themselves, the majority denies employees adequate notice of when they can bring a claim. Indeed, the majority's interpretation may fail to provide any notice *at all* to employees as to when their claims may commence or be foreclosed. There is a reason that statutes of limitations for anti-retaliation actions begin with the alleged retaliatory event. Because the retaliation bears adversely on the affected employee, it serves as the best possible notice that the employee may henceforth seek redress.

The same reason suggests why Congress did not mandate a six-year statute of limitations for section 3730(h) actions. Since false claims themselves are acts of deception, it makes sense for a longer statute of limitations to provide time to uproot the deception. But this is simply not a concern for employees under section 3730(h) who will feel the sting of the retaliatory actions at the moment they occur.

The matter seems almost second-nature. Statutes of limitations for personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin

> to run on the date of the discharge. In an action challenging a wrongful act, the limitations period generally begins on the date of the act. In short, I am unable to understand why my friends in the majority go to such extraordinary lengths to resist such a thoroughly ordinary principle.

367 F.3d at 260 (Pet. App. 35a-36a) (citations omitted). The effect of the Fourth Circuit's opinion is to replace a clear and definite date for the commencement of the limitations period (the employee's date of discharge) with a commencement date that is fraught with uncertainty. Although an employee will always know his or her date of discharge, in many cases, the employee will not know when the alleged fraud upon the Government occurred. Because litigants can no longer look to the act of discharge and calculate the applicable limitations period from that date, both the employee and employer must conduct discovery and litigate the underlying False Claims Act violation before ever determining whether the retaliatory discharge claim is stale. Accordingly, the decision has a significant impact upon litigation costs (and judicial resources) in retaliatory discharge actions.

Finally, the Fourth Circuit's decision threatens to undermine the limitations periods for every other whistleblower statute enacted by Congress. The limitations periods for each of these statutes is significantly less than six years; many of these statutes require the employee to act within 30 days of the discharge. *See supra* p. 11 n.1. With the decisions of the Third, Fourth and Seventh Circuits that a six year limitation period applies to 31 U.S.C. § 3730(h), employees who miss the filing deadlines under these other whistleblower statutes will simply

repackage their retaliation claim as one arising under the False Claims Act. To do so, the employee must merely assert that the alleged wrongdoing touches upon some aspect of Government spending. Given the Government's pervasive presence as a purchaser of goods and services, virtually every whistleblower claim from the Aviation Investment and Reform Act to the Federal Deposit Insurance Act can be repackaged as a claim under the False Claims Act. Thus, the Fourth Circuit's imposition of a six year statute of limitations has significant and far reaching implications upon every whistleblower statute enacted by Congress.

Here, the plaintiff is seeking back pay from March 7, 1997. Given the double damage provision of the False Claims Act, she is effectively seeking to recover 15 years of salary. Despite her delay in filing this action, the Fourth Circuit has allowed her claim to go forward. Not only does that decision force the defendants before the Court to defend a stale claim in which back pay damages are mounting with each passing day, the decision has far-reaching implications upon all employers doing any form of business with the United States Government.

III. THE FOURTH CIRCUIT ERRED IN APPLYING A SIX YEAR LIMITATION PERIOD TO RETALIATORY DISCHARGE ACTIONS UNDER THE FALSE CLAIMS ACT.

This Court should also grant certiorari in that the Fourth Circuit clearly erred in applying a six year limitation period to claims brought under 31 U.S.C. § 3730(h). The Fourth Circuit's

construction of this statute is contrary to the language of the False Claims Act, misconstrues congressional intent, and produces an illogical and unmanageable scheme for limiting stale claims.

1. The Fourth Circuit's construction of the False Claims Act is contrary to the language of that Act.

The retaliatory discharge provision of the False Claims Act is found at 31 U.S.C. § 3730(h). This sub-section provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

31 U.S.C. § 3730(h) (2004). Section 3729 of the False Claims Act, 31 U.S.C. § 3729, sets out the conduct that constitutes the submission of a false claim to the Government. Section 3729 speaks only to the underlying False Claims Act violation and contains no reference to wrongful discharge or any act that would constitute a violation of 31 U.S.C. § 3730(h).

Section 3731 of the False Claims Act provides as follows:

> (b) A civil action under section 3730 may not be brought - -
>
> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b) (2004). The Fourth Circuit concluded that because the retaliatory discharge provision falls within Section 3730, the language of Section 3731 requires that a six-year limitation period be applied to such claim. Section 3731, however, only addresses the limitation period for an underlying

violation of the False Claims Act, not a retaliatory discharge claim. As Judge Wilkinson explained in his dissent:

> The text of [31 U.S.C. § 3731(b)] could not be more plain. The six-year period is tied to a "violation of section 3729" and nothing else. Because an anti-retaliation claim does not involve a "violation of section 3729" but instead a violation of section 3730(h), by its own terms section 3731(b)(1) cannot apply. Section 3729 addresses only the submission of false claims to the federal government. Section 3729 does not address retaliatory actions by employers against whistle-blowing employees. Indeed, an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of section 3729 violations, which would leave the statute of limitations without a starting point. Retaliation by an employer may also occur more than six years after the employer committed the false claims violations, which would leave the employee without a cause of action. Therefore, it seems incongruous to say the least that an employee's ability to bring retaliatory claims should turn on when or whether the employer has submitted false claims to the government in violation of section 3729.

367 F.3d at 258 (Wilkinson, J., dissenting). The limitation period in Section 3731(b) is directly tied to a "violation of section 3729." Section 3729, in turn, "strictly addresses false

claims, not retaliation claims." *Lujan v. Hughes Aircraft Co.*, 162 F.3d at 1034. Thus, the language of the limitations period set out in Section 3731(b) "clearly speaks only to the underlying False Claims Act violation." J. Boese, Civil False Claims and Qui Tam Actions § 4.11[A], at 4-204 (Supp. 2000). Accordingly, the structure and language of the False Claims Act make clear that Congress did not provide for a specific statute of limitations with respect to retaliatory discharge claims arising under the Act.

2. The Fourth Circuit's decision misconstrues and ignores congressional intent.

As set out in the legislative history of the 1986 amendments to the False Claims Act, the Act's whistleblower provisions were modeled after eight other statutes that had been previously enacted by Congress:

> [T]he Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence "whistleblowers," as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.
>
> In forming these protections, the Committee was guided by the whistleblower protection provisions found in Federal safety and environmental statutes including the Federal Surface Mining Act, 30 U.S.C. 1293, Energy Reorganization Act, 42 U.S.C. 5851, Clean Air Act, 42 U.S.C. 7622, Safe Drinking Water Act

42 U.S.C. 300j-9, Solid Waste Disposal Act, 42. U.S.C. 6971, Water Pollution Control Act, 33 U.S.C. 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and Toxic Substances Control Act, 15 U.S.C. 2622.

S. Rep. No. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. Like 31 U.S.C. § 3730(h), each of these eight whistleblower statutes provides that an employee who has suffered retaliation may be reinstated to his or her position and recover back pay. These statutes further provide that an employee loses his or her right to pursue a whistleblower claim unless the claim is asserted within a relatively short time period from the discharge. The longest period that any of these eight statutes allows for the filing of a claim is180 days from the discharge or discrimination. The vast majority of these statutes provides that a claim must be asserted within 30 days of the discharge.

In contrast to these eight statutes, the Fourth Circuit has concluded that the time period for filing a retaliation claim under the False Claims Act is six years and that this period runs from the date of the underlying False Claims Act violation rather than the date of the retaliatory act. No other whistleblower statute enacted by Congress has ever had a limitations period even remotely approaching six years. Moreover, every one of these statutes provides that the limitations period begins running upon the act of discharge or discrimination. Had Congress truly intended to make such a radical departure from other whistleblower statutes, this intent would have undoubtedly been discussed at length during congressional debate. No such debate

occurred. In fact, as set out below, *infra* pp. 21-25, the discussion of the 1986 amendment during congressional debate reflects that Congress believed that the six year limitation period does not apply to retaliatory discharge claims under 31 U.S.C. § 3730(h).

Sound public policy reasons exist for Congress' decision to enact relatively short limitation periods with respect to whistleblower statutes. When a statute provides for reinstatement, the longer an employee delays in asserting his or her rights, the more difficult it is for the employer to reinsert the employee into the same position. Moreover, when Congress provides for recovery of back pay, a lengthy limitation period may result in economic waste in that it encourages an employee to sit on his or her claim in order to recover the greatest possible damages. *See, e.g., Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (Congress intended short limitation period when "damages such as backpay may be mounting"); *see also Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (limitation periods "protect employers from the burden of defending claims arising from employment decisions that are long past"). As Judge Posner has noted, "The statute of limitations is short in . . . most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990).

Although the Fourth Circuit purports to base its decision on the legislative history of the 1986 Amendments to the False Claims Act, the Fourth Circuit utterly ignores debate on the floor of Congress that clearly shows that Congress never intended to apply a six year statute of limitation to claims brought under 31 U.S.C.§ 3730(h). In its opinion, the Fourth Circuit notes that the

original drafts of the House and Senate bills to amend the False Claims Act set out the retaliatory discharge provisions as a separate section of the statute (to be codified at 31 U.S.C. § 3734). *See* 367 F.3d at 252 (Pet. App. 15a-16a). Thereafter, Congress condensed the act by simply placing this proposed new section as a sub-section within 31 U.S.C. § 3730. The majority opinion concludes that this renumbering of the statute evidences Congress' intent that a six year statute of limitations be applied to retaliatory discharges:

> Had § 3730(h) been enacted as a separate section as originally contemplated by the legislative history to the 1986 amendments, a claim of retaliation under the FCA would not constitute "[a] civil action under § 3730," and thus Congress's intent to have courts apply the most analogous state statute of limitations would be clear. Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply.

367 F.3d at 252 (Pet. App. 16a) (citations omitted). The Fourth Circuit, however, ignores the fact that both before and after the renumbering of the statute, Congress clearly understood and believed that this six year limitation provision would only be applied to violations of the False Claims Act brought on behalf of the Government (as opposed to retaliatory discharge claims brought by an employee for the sole benefit of the employee).

On December 12, 1985, the Senate Judiciary Committee reported favorably on the proposed amendments to the False

Claims Act (Senate Report No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266). As of that date, the retaliatory discharge provisions were to be set out as a separate section (31 U.S.C. § 3734) and had not yet been moved into 31 U.S.C. § 3730. In addition to adding whistleblower protection to the False Claims Act, the proposed amendments enlarged the limitations period with respect to claims brought on behalf of the Government. In its discussion of this change, the Senate Report makes clear that the six year statute of limitations (as amended by the proposed legislation) only relates to False Claims Act violations brought for the benefit of the Government:

> Seventh, the subcommittee added a modification of the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when **the Government** learned of a violation, whichever is later. The subcommittee agreed that because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure **the Government's** rights are not lost through a wrongdoer's successful deception.

S. Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (emphasis added). As reflected by this Senate Report, the proposed amendments (as they existed as of December 12, 1985) were not intended to create a six year limitations period for retaliatory discharge claims. Rather, the six year limitation period and the new tolling provision were

limited to claims brought on behalf of **the Government** to "ensure **the Government's rights** are not lost."

In September 1986, Congress altered the bill as it had been reported by the Senate and House Judiciary Committees. As part of those changes, the retaliatory discharge provision (proposed as a new section 31 U.S.C. § 3734) was moved into 31 U.S.C. § 3730. 132 Cong. Rec. 22,332 & 28,576 (1986). Following the renumbering of the statute, however, Congress continued to view the six year limitation period as being applicable only to False Claims Act violations brought on behalf of the Government. On September 9, 1986, Congressman Fish of New York, in discussing the revised bill, stated in floor debate:

> Section 5 amends the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted, the current standard, or within 3 years after **the Government** learns of the violations, whichever is later.

132 Cong. Rec. 22,337 (1986). Thus, even after the consolidation of the whistleblower provisions into Section 3730, Congress believed that the six year limitation period was only applicable to claims brought on behalf of the Government. The six year limitations period was not intended to apply to employees making a retaliation claim for their own personal benefit. Rather than supporting the position taken by the Fourth Circuit, the legislative history of the 1986 amendments to the False Claims Act demonstrates that Congress did not intend to

apply a six year statute of limitations to retaliatory discharge claims.

3. The Fourth Circuit's decision is illogical and creates an unmanageable scheme for determining when the limitation period commences.

Under the Fourth Circuit's decision, the limitation period for a retaliatory discharge claim under the False Claims Act begins to run from the date of "the violation of Section 3729." Thus, the Fourth Circuit ties the limitation period not to the act of retaliation, but to the date of the underlying False Claims Act violation. In doing so, the Fourth Circuit produces a result that is illogical and is contrary to every other whistle-blower statute enacted by Congress.

First, the Fourth Circuit's decision fails to provide employers and employees with adequate notice as to when the statute of limitations begins to run. Under every whistleblower statute in this Country, the limitations period begins to run upon the act of the discharge or retaliation. The reason is simple – employees know immediately when they have been fired. The injury resulting from the retaliatory act is open and obvious. In contrast, in many cases an employee will not know with specificity the date on which a violation of Section 3729 first occurred.

Second, the Fourth Circuit's interpretation of the False Claims Act leads to the absurd result that the retaliatory discharge claim of some whistleblowers will be time barred even before the act of discharge. Under the Fourth Circuit's decision, the limitations period begins running six years from the time the

employer submits a false claim to the Government. If an employee discovers a false claim years after the claim was submitted and proceeds to blow the whistle, Section 3730(h) will not protect the employee from retaliation. As courts and commentators have noted, it would be a "bizarre result" if an employee who brings a false claim action immediately prior to the expiration of the six year period could be fired shortly thereafter and yet the employee's retaliatory discharge claim would be time-barred. J. Boese, Civil False Claims and Qui Tam Actions § 4.11[A], at 4-205 to -206 (Supp. 2000).

Third, the Fourth Circuit's decision creates "an unprecedented oddity" in that while some employees will see their retaliation claim time barred even before the act of discharge, for other employees, their claim will never be time-barred. *Graham County Soil & Water*, 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 35a). A retaliatory discharge claim may occur even when there has been no violation of Section 3729. S. Rep. No. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300. Thus, under the rationale adopted by the Fourth Circuit, when an employee incorrectly (but in good faith) blows the whistle on his or her employer, any retaliatory discharge claim brought by that employee will never be time barred. For such employees, the stop watch upon the limitations period is never started because there has been no "violation of Section 3729."

The Fourth Circuit decision imposes upon the False Claims Act a framework for determining whether a retaliatory discharge claim is time barred that is both illogical and inconsistent with congressional intent. Given the language of the Section 3730, the legislative history of the 1986 amendments and the bizarre outcomes that flow from tying the limitation

period to anything other than the date of the retaliatory act, it is clear that Congress did not intend for a six year period set out in 31 U.S.C. § 3731(b) to apply to retaliatory discharge claims.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 28, 2004

*Counsel of Record

APPENDIX

APPENDIX

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Defendants-Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR; JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99,

Defendants.

No. 03-1122

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

367 F.3d 245; 2004 U.S. App. LEXIS 8477; 21 I.E.R. Cas. (BNA) 507

October 28, 2003, Argued
April 29, 2004, Decided

OPINION

[*247] DUNCAN, Circuit Judge:

Karen Wilson brought a *qui tam* action under the Federal False Claims Act, 31 U.S.C. §§ 3729-3733 (2000) ("the FCA" or "the Act"), alleging that her coworkers had submitted false claims to the federal government in violation of the FCA and that she was constructively discharged in retaliation for reporting these activities. Deciding that the six-year limitations period of the FCA did [**2] not apply to the retaliation claim, the district court applied North Carolina's three-year limitations period for wrongful discharge actions and dismissed Wilson's claim as untimely. Because we conclude that the six-year limitations period of the FCA does apply to retaliation claims under the Act, we reverse the district court's dismissal and remand for further proceedings.

I.

Wilson is a former part-time secretary at the Graham County Soil & Water Conservation District ("the

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

Conservation District"). On January 25, 2001, Wilson filed a *qui tam* action pursuant to § 3730(b) of the FCA, alleging that several of her former coworkers at the Conservation District had intentionally submitted false claims for reimbursement from three programs created or funded by the federal government. Wilson's complaint further alleged that after she reported her concerns in a letter to federal authorities, her supervisors and coworkers initiated a pattern of harassment that precipitated her resignation on March 7, 1997.

The Appellees moved to dismiss Wilson's claims under Federal Rule of Civil Procedure 12(b)(6). The Appellees argued that the FCA's statute [**3] of limitations did not apply to retaliation, and thus the timeliness of Wilson's claim should be controlled by North Carolina's three-year statute of limitations for wrongful discharge. The district court concluded that applying the FCA's limitations provision to retaliation claims could lead to absurd results, and that the timeliness of Wilson's claim should be controlled by North Carolina law. Agreeing with the Appellees that the closest analogous limitations period was the three-year period applicable to claims of wrongful discharge, *see* N.C. Gen. Stat. § 1-52(5) (1999), the district court concluded that the retaliation claim in Wilson's complaint of January 25, 2001, based on her constructive discharge of March 7, 1997, was untimely.

Wilson filed a motion for reconsideration of the statute of limitations issue. The district court denied Wilson's

request for reconsideration, but certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (2000). We granted Wilson's timely petition for authorization to pursue this appeal.

II.

We review de novo the district court's order granting the Appellees' Rule 12(b)(6) motion [**4] to dismiss, *Franks v. Ross*, 313 F.3d 184, 192 (4th Cir. 2002), as well as its statutory construction of the FCA, *see United States v. Jefferson-Pilot Life Ins. Co.*, 49 F.3d 1020, 1021 (4th Cir. 1995). It is axiomatic that when interpreting a statute, the starting point is the language employed by Congress, *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68, 71 L. Ed. 2d 748, 102 S. Ct. 1534 (1982), and where "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms,'" *United States v. Ron Pair* [*248] *Enters.*, 489 U.S. 235, 241, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 61 L. Ed. 442, 37 S. Ct. 192 (1917)). In determining whether the language is plain, courts must look to "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 136 L. Ed. 2d 808, 117 S. Ct. 843 (1997). If the language of the statute is ambiguous, in that it lends itself to more than one reasonable interpretation, our obligation is "to find that interpretation which can [**5] most fairly be said to be imbedded in the statute, in the sense of being most

harmonious with its scheme and with the general purposes that Congress manifested." *Comm'r v. Engle*, 464 U.S. 206, 217, 78 L. Ed. 2d 420, 104 S. Ct. 597 (1984) (internal quotation omitted). A departure from the literal text of a statute is also appropriate if "a literal application would frustrate the statute's purpose or lead to an absurd result." *Nat'l Coalition for Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 152 F.3d 283, 288 (4th Cir. 1998) (quoting *Robinson*, 519 U.S. at 340).

Three sections of the FCA determine whether the timeliness of Wilson's retaliation claim is governed by the Act itself or state law. The FCA's limitations period, § 3731(b), provides that

> [a] civil action under section 3730 may not be brought -
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed . . . .

§ 3731(b)(1). n1 Section 3730 creates three causes of action arising under the FCA: an action for compensation filed by the Attorney General, *see* § 3730(a); a *qui tam* action filed by an individual, *see* § 3730(b); and an action [**6] for retaliatory conduct predicated on identified protected activity, *see* § 3730(h). Section § 3729 creates and defines the parameters of liability for presenting a false claim to the Government. Hence, the effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be

brought no more than six years after the date on which the underlying violation was committed.

> n1 Section 3731(b)(2) states that, in the alternative, a civil action under § 3730 may not be filed "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." However, because neither party advances this alternative limitations period as controlling, and "there is no 'official of the United States charged with responsibility to act in the circumstances' that are presented in a typical retaliation case," *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 n.20 (E.D. Va. 2001), we limit our analysis to § 3731(b)(1).

[**7]Both the retaliation provision of § 3730(h) and the limitations provision of § 3731(b)(1) are relatively recent additions to the FCA. Prior to 1986, the FCA did not specifically include a cause of action for retaliation. Section § 3731(b) stated simply that "'a civil action under Section 3730 of this title must be brought within six years from the date the violation is committed.'" *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998)

(discussing the 1986 amendments). Congress's stated intent in amending the FCA was "not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of Government fraud to bring that information forward." S. Rep. [*249] No. 99-345, at 1-2 (1986) (hereinafter "S. Rep."), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267. Toward that end, Congress also added § 3730(h), n2 which provides a remedy for any employee who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" as a result of lawful acts by the employee in furtherance of an action under the FCA.

> n2 In full, this subsection provides that:
> "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole."§ 3730(h).

[**8]The proper interpretation of these provisions has divided both our sister circuits and courts within this circuit. n3 In *United States ex rel. Lujan v. Hughes Aircraft Co.*, the Ninth Circuit held that § 3731(b)(1) did not apply to retaliation claims under the FCA. 162 F.3d at 1034-36. The *Lujan* court reasoned that the 1986 amendments, "while adding a provision for retaliation claims under § 3730(h), narrowed the application of the six-year statute of limitations to violations of § 3729," such that the amendments "created the retaliation claim but provided no specific statute of limitations for such claims." *Id.* In view of this perceived absence of a congressionally prescribed statute of limitations, the Ninth Circuit concluded that "the most closely analogous statute of limitations under state law" must fill the void. *Id.* at 1035 (citing *Reed v. United Transp. Union*, 488 U.S. 319, 323, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989)).

n3 Compare *Storey*, 207 F. Supp. 2d at 444 (applying § 3731(b)(1) to retaliation claims under § 3730(h)), *with United States ex rel. Ackley v. IBM*, 110 F. Supp. 2d 395, 401-05 (D. Md. 2000) (assuming, without deciding, that § 3731(b)(1) did not apply to retaliation claims under § 3730(h) for the reasons described by the court below).

[**9]In contrast, in an earlier decision which the court in *Lujan* failed to distinguish or cite, the Seventh Circuit found no difficulty in applying § 3731(b)(1) to retaliation claims

under § 3730(h). *See Neal v. Honeywell, Inc.*, 33 F.3d 860, 865-66 (7th Cir. 1994). n4 The employer in *Neal* made the same argument accepted by the district court (and propounded by the dissent). Expressing a concern for the rights of employees generally (although, similar to the dissent here, not the employee who filed the complaint at issue), the employer contended that § 3731(b)(1) could not apply to retaliation claims, as a literal application of its terms would lead to absurd results. The *Neal* court disagreed, concluding that the revised language of § 3731(b)(1) reflected Congress's decision to prioritize "simplicity of administration," and that the employer had mischaracterized the consequences of a literal reading of the statute. n5 *Id.* at 865. Against this backdrop, we consider Wilson's contention that the district court erred in declining to apply § 3731(b)(1) to her retaliation claim under § 3730(h).

n4 Like the court in *Lujan* on which so much of its reasoning relies, the dissent does not address *Neal* or its analysis. [**10]

n5 The United States' brief in *Neal*, filed as an *amicus curiae* at the invitation of the court, "concluded that the statute supports Neal without a thumb on the scales of justice." 33 F.3d at 863.

III.

Starting, as we must, with the text of the FCA, we find no ambiguity undermining [*250] the conclusion that Congress intended the revised limitations period of

§ 3731(b)(1) to apply to all claims under § 3730, including retaliation claims under § 3730(h). We are unpersuaded that Congress's addition of language referring to "the date on which the violation of section 3729 is committed" was intended to exclude § 3730(h) from the ambit of § 3731(b)(1), and that the consequences of the resulting statutory scheme are not absurd, but are in keeping with the FCA's purpose.

The dissent, like the Appellees, argues that the text of § 3731(b)(1) "could not be more plain. The six-year period is tied to a 'violation of section 3729' and nothing else." *Post* at 20. As explored below, however, this assertion is demonstrably inaccurate. Section 3731(b) *could* have provided that a "civil [**11] action under section 3730(a) or (b) may not be brought more than six years from the date the violation of § 3729 is committed." This Congress did not do. Despite its Herculean effort, the dissent cannot disguise the fact that it is asking us to ignore what Congress expressly says: that an action under § 3730(h) protesting retaliation is "[a] civil action under § 3730."

A.

The threshold inquiry when interpreting the text of a statute is whether the language at issue "has a plain and unambiguous meaning with regard to the particular dispute in the case," for if the language is unambiguous and the "statutory scheme is coherent and consistent," no further inquiry is required. *Robinson*, 519 U.S. at 340. Indeed, "there is, of course, no more persuasive evidence of the purpose of

a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Trucking Assns., Inc.*, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940); *see also Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980) ("Absent a clearly expressed legislative intention to the contrary, that [**12] language must ordinarily be regarded as conclusive."). A term in a section is ambiguous only if, when considered in the larger context of the statute as a whole, it is amenable to more than one reasonable interpretation. *Engle*, 464 U.S. at 217. n6

n6 The dissent draws on two additional canons of statutory construction that we find to be inapplicable to this situation. The first is that "'when Congress alters the wording of a statute, we must presume Congress intended a change in the law.'" *Post* at 21 (quoting *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997). However, the authority cited by Lackey, *Brewster v. Gage*, 280 U.S. 327, 337, 74 L. Ed. 457, 50 S. Ct. 115 (1930), makes clear that this doctrine is relevant when Congress uses language "so differing from that used in the earlier act" that it could not but demonstrate Congress's intent to work a change in the law. The dissent's reliance on *Lackey* is circular, as the few newly added words on which it is predicated are so

equivocal that we must discern Congress's intent from the remainder of the section and its context, as we have attempted to below; the simple fact of revision does not demonstrate intent, the text does. *See United States v. Sepulveda*, 115 F.3d 882, 885 n.5 (11th Cir. 1997) (finding the amended language of a statute to be "inconclusive" as to Congress's intent and analyzing the statute based on its plain language and legislative purpose).

The second is the canon "*expressio unius est exclusio alterius*"; that the explicit inclusion of one or more of an obvious set signals Congress's intent to exclude the remainder of that set. *See, e. g., United States v. Vonn*, 535 U.S. 55, 65, 152 L. Ed. 2d 90, 122 S. Ct. 1043 (2002). As the dissent acknowledges, however, this canon is less a directive than a guide, *id.*, and in this instance the doctrine appears to be of dubious use. *Cf. Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81-84, 153 L. Ed. 2d 82, 122 S. Ct. 2045 (2002) (identifying "statutory language suggesting exclusiveness" and an "established series ...from which Congress appears to have made a deliberate choice" as two requirements that must be met in order to justify application of

the "*expressio unius*" doctrine, neither of which are clearly present in the amended FCA).

[*251] B.

Applying these principles to sections 3730(h) and 3731(b), we conclude that § 3731(b)(1) plainly applies to retaliation claims under § 3730(h). As noted above, the text of § 3731(b) does not exclude § 3730(h). Rather, the language of § 3730(b) states broadly that it applies to "[a] civil action under section 3730." § 3730(b). Because Congress elected not to modify this language in 1986 while adding a third cause of action to § 3730, we conclude that Congress intended § 3731(b) to continue to apply to all actions under § 3730, including the newly added cause of action for retaliation.

In contrast, we find the Appellees' competing interpretation of § 3731(b)(1) to be unpersuasive, and for reasons in addition to the fact that it requires the eliding of a provision to which the language would otherwise apply. The Appellees point to the differences in the provisions of § 3730 to which the six year limitations period of § 3731(b)(1) appears to apply. The Appellees argue that § 3730(a), involving an action by the Attorney General, and § 3730(b), authorizing actions by individuals, are based entirely on violations of § 3729, whereas retaliation claims under § 3730(h) [**14] are not. They reason that because § 3731(b)(1) begins the limitations period on the "date on

which the violation of § 3729 is committed," Congress cannot have intended § 3731(b)(1) to include § 3730(h).

This interpretation of the FCA is artificial, however, as § 3730(h) subsumes a violation of § 3729, even if it does not do so explicitly. By its terms, § 3730(h) protects any "lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section." Id.* (emphasis added). Because an action under § 3730 will not lie absent an alleged violation of § 3729, it is clear that Congress has elected to identify a single, readily identifiable point at which to begin the limitations periods for all actions under § 3730. *See Neal*, 33 F.3d at 865 (noting the "simplicity of administration" afforded by the approach codified in § 3731(b)(1)). Indeed, as noted by Judge Easterbrook, "it is easier to determine the date of a false claim than to pin down the time of retaliatory acts; the claim is a document, but arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication. [**15] "*Id.* Rather than signaling by implication Congress's intent to exclude retaliation claims from § 3731(b)(1), the amended text of § 3731(b)(1) simply directs that the limitations period for retaliation claims under the FCA begins when the violation of § 3729, to which such violations of § 3730(h) must be tethered, n7 is found to have occurred.

> n7 Although we believe this fact to be self-evident, the dissent contends that the filing of a false claim in violation of § 3729 and a retaliatory discharge actionable under § 3730(h) are "independent" events, *post* at 18, an assertion we find puzzling. If an employee's termination is "independent" of a violation of § 3729 and the employee's decision to report it, at the very least, it would not be retaliatory. Alternatively, if the termination could fairly be described as "retaliatory," but could not be tied to the reporting of a violation of § 3729, it would be actionable not under the FCA and § 3730(h) but under Title VII or some other statute prohibiting employment discrimination. The events that trigger the statute of limitations may precede the final event that gives rise to an action for retaliation, *post* at 20, but that fact does not render the events "independent" of one another.

[**16] [*252] C.

Even if it were unclear whether Congress intended the language of § 3731(b)(1) to apply to actions under § 3730(h), the review of the legislative history required by that ambiguity reinforces the conclusion that the section applies to retaliation claims under the FCA. In discussing the provisions created by the 1986 amendments, the legislative history discusses "a new section 3734 under the False Claims Act to provide 'whistleblower' protection." S. Rep. at 34, *reprinted in* 1986 U.S.C.C.A.N. at 5299. This new section

was to "provide[] 'make whole' relief" for anyone discharged for engaging in activity protected under the Act, including anyone who is "'discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against.'" *Id.* However, no such completely new section was added. Instead, Congress added this provision to § 3730 as subparagraph (h). *See* False Claims Amendment Act of 1986, Pub. L. No. 99-562, § 4, 100 Stat. 3153, 3157-58 (1986). n8 Had § 3730(h) been enacted as a separate section as originally contemplated by the legislative history to the 1986 amendments, a claim of retaliation under the FCA would not constitute "[a] [**17] civil action under § 3730," and thus Congress's intent to have courts apply the most analogous state statute of limitations would be clear. *See Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989). Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply. *Cf. Russello v. United States*, 464 U.S. 16, 23-24, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). n9

n8 In the version of the amendments proposed by the House of Representatives, the retaliation provision was to be included as § 3730(g). *See* H.R. Rep. No. 99-660, at 12-14 (1986).

n9 We note that *Lujan* did not consider this legislative history in concluding that "*in the absence of some meaningful indication to the contrary*, we must therefore presume that, in amending section 3731(b) ... Congress did not intend that the statute apply to section 3730(h)." 162 F.3d at 1035 (emphasis added).

[**18] IV.

As an alternative basis to facial ambiguity for exempting Wilson's retaliation claim from the six-year limitations period of the FCA, the Appellees press the district court's conclusion that a literal application of the text of § 3731(b)(1) to retaliation claims under § 3730(h) would lead to absurd results. The Appellees posit two variations on this theme. The first arises from the fact that § 3731(b)(1) effectively begins the limitations period for retaliation claims before the act of retaliation occurs. The second arises from the Appellees' reading the term "violation" in § 3731(b)(1) to require an actual and substantiated violation of § 3729. We consider in turn whether either of these hypothetical situations constitutes an absurd result. n10

n10 The dissent describes this discussion as an attempt to advance "a number of policy rationales to support [our] result." Post at 18. The dissent neglects to point out that these purported "policy rationales" are merely an exploration of the consequences that flow

> directly from the text of the FCA itself, and are offered to demonstrate only that the statute means precisely what the statute says. In contrast, the dissent offers a number of policy rationales for its competing construction of § 3731(b), which considers only a part of the language added by Congress in 1986. More importantly, the dissent's dissertation fails to demonstrate that any of the consequences identified here are absurd. Certainly, the arrangement that follows from the plain text of the § 3731(b) is a departure from the limitations periods generally applicable to claims of retaliation, and the dissent points out the merit of the usual scheme. Nevertheless, when Congress's intent to endorse the benefits and consequences of one statutory scheme over another is clear from the text of the statute, as we conclude it is here, "the wisdom of Congress' action ...is not within our province to second guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222, 154 L. Ed. 2d 683, 123 S. Ct. 769 (2003).

To the extent the dissent cannot fathom why "the majority goes to such extraordinary lengths" to resist his views, *post* at 23, we can only proffer our obligation to apply Congress's language as written. Congress has the discretion to designate the starting point for the running of the statute of

limitations period it imposes. When it does so, as it has here, we do not feel it appropriate to substitute one we prefer. *Eldred*, 537 U.S. at 222. [**19] [*253]

A.

In support of their argument that § 3731(b)(1) may, in certain circumstances, foreclose a claim for retaliation before it accrues, the Appellees offer two specific examples. First, an employer may, if the whistle-blowing employee has reported a false claim that the employer submitted several years earlier, elect to wait-out the limitations period before terminating or otherwise retaliating against that employee. Or, an employee may report a § 3729 violation that is so old that the limitations period expires shortly after the employee reports the violation, effectively leaving the employee unprotected. However, neither result is necessarily absurd.

As a threshold matter, we note that statutes of repose have the same effect. Yet we find no absurdity in Congress's prerogative to limit the rights it creates in this manner. "Statutes of repose, increasingly common in tort cases, have the potential to block litigation before the tort occurs." *Neal*, 33 F.3d at 865. Assuming that this is indeed "what Congress had intended to accomplish by way of the limitation period contained in the False Claims Act, 'that would not condemn [those provisions] as absurd. It would [**20] show only that Congress had opted for simplicity of administration.'" *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 (E.D. Va. 2001) (alteration in original) (quoting *Neal*, 33 F.3d at 865).

Second, courts have recognized that there is, as a practical matter, a close temporal relationship between a protected act and the retaliatory conduct based on it. *See Neal*, 33 F.3d at 865-66; *Storey*, 207 F. Supp. 2d at 446 (citing *Grand ex rel. United States v. Northrop Corp.*, 811 F. Supp. 333, 336 (S.D. Ohio 1986)). As a result, there would be few instances in which several years would pass between the violation, the protected conduct, and the retaliatory act. Additionally, the length of the limitations period in § 3731(b)(1) lessens the likelihood that the purportedly absurd consequences advanced by the Appellees would occur. Moreover, the six years provided from the date of the violation should be sufficient to encompass the protected act and the retaliation, lest they both face challenges for attenuation and staleness.

Even assuming the hypothetical circumstances described by the Appellees occur, [**21] the doctrines of equitable tolling or equitable estoppel may provide relief. *Neal*, 33 F.3d at 866. These doctrines are "based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff from filing his or her claim on time." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987). In those instances where the employer has delayed a retaliatory termination until the statute of limitations has run, the employee's failure to file in timely fashion may fairly be [*254] described as "the consequence ...of a deliberate design by the employer," such that the employer could be barred from raising the

limitations period as a defense under the doctrine of equitable estoppel. *Id.* (internal quotation omitted). n11 Ultimately, the speculation that a plain-text application of the FCA's amended language *could* yield an absurd result in a limited category of hypothetical cases stands in stark contrast to the decidedly unfavorable result that interpretation would have on the retaliation claim at issue here. The result which would flow from the interpretation advanced by the Appellees [**22] and the dissent would comport with neither Congress's stated intent in amending the FCA ". . . to encourage any individual knowing of Government fraud to bring that information forward," S. Rep. at 1-2, *reprinted in* U.S.C.C.A.N. at 5267, nor with the liberal interpretation to be accorded to remedial legislation, *Neal*, 33 F.3d at 862.

n11 As an additional matter, we note that none of the various potentially absurd outcomes identified by the Appellees' brief would arise under the facts presented in this case. This too counsels against adopting the Appellees' construction of the FCA here. This court's function in interpreting a statute is "to determine whether the language at issue has a plain and unambiguous meaning with regard *to the particular dispute in the case." Robinson*, 519 U.S. at 340 (emphasis added). While we are not convinced that any of the consequences advanced by the Appellees as a result of applying § 3731(b)(1) to retaliation

> claims under the Act are absurd, the fact that none of these consequences arise in the context of Wilson's retaliation claim reinforces our conclusion that these arguments in favor of applying the North Carolina statute should not be dispositive on appeal.

[**23] B.

Nor are we convinced by the Appellees' contention that, if courts must look to when "the violation of section 3729 is committed," applying § 3731(b)(1) to a retaliation claim under the Act would have the absurd result of withholding retaliation protection until an action under § 3730(a) or (b) proves that such a violation actually occurred. While subparagraph 1 of § 3731(b), when read in isolation, is susceptible to a reading that begins the limitations period with a proven violation rather than an alleged violation, *see Ackley*, 110 F. Supp. 2d at 402, we are not persuaded this construction is appropriate, particularly when read in the broader context of the FCA.

As a threshold matter, the Appellees' construction of "violation," even when read in isolation, arguably reduces § 3731(b)(1) to surplusage. If the term "violation" in § 3731(b)(1) is read to require a judicially substantiated violation of § 3729 as the Appellees contend, that provision could not serve as the limitations period for the very actions under § 3730(a) or § 3730(b) necessary to prove such a violation. So read, § 3730(b)(1) would not apply to any action under § 3730. Expanding the [**24] inquiry to include

other provisions of the FCA reinforces the conclusion that the Appellees' reading of "violation" is inappropriate. In *Neal*, the Seventh Circuit concluded that § 3730(h) applied to retaliation claims even in the absence of a judicially vindicated violation of § 3729. *See* 33 F.3d at 863-64. It did so in light of the breadth of activities protected by § 3730(n), which includes supplying "information during the 'investigation' of a suit 'to be filed' in the future." *Id.* (quoting § 3730(h)). More importantly, *Neal* also concluded based on this language that it was inappropriate to read the term "violation" as "a condition subsequent, necessary to perfect the protection for activities that were sheltered at the moment of their commission." *Id.* at 864. Rather, it should be assessed "according to [*255] how things stood at the time of the investigatory activity." *Id.*

We note too that the Appellees' interpretation of "violation" is equally incompatible with the fact that retaliation provisions do not generally require the plaintiff to engage in activity that is actually protected. An objectively reasonable "good faith" belief [**25] that the activity is protected is sufficient to satisfy the prima facie requirement for retaliation claims. *Cf. Peters v. Jenney*, 327 F.3d 307, 321 (4th Cir. 2003) (noting that in order to make out a prima facie claim of retaliation under the Civil Rights Act of 1964, a plaintiff need only demonstrate a subjective "good faith" belief that the activity she engaged in was protected that is objectively reasonable, rather than proving conclusively that the activity was protected as a matter of law). In light of the

tension created by the Appellees' narrow definition of violation when considered in light of the other language in § 3731(b) and the FCA as a whole, we decline to apply that construction, as "its invocation would result in a construction of the statute which ...is at odds with the language of the section in question and the pattern of the statute taken as a whole." *SEC v. Sloan*, 436 U.S. 103, 121, 56 L. Ed. 2d 148, 98 S. Ct. 1702 (1978).

V.

Finally, we are not convinced that applying § 3731(b)(1) to Wilson's retaliation claim would yield a result that is at odds with Congress's intent in amending the FCA. To the contrary, we find the purposes of the FCA [**26] are well-served by application of § 3731(b)(1) to retaliation actions under § 3730(h), for three reasons. First, as the Supreme Court recently noted, one of the intended effects of Congress's 1986 amendments to the FCA was to "enhance[] the incentives for relators to bring suit." *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133, 155 L. Ed. 2d 247, 123 S. Ct. 1239 (2003). Significantly, we note that recourse to the generally shorter limitations periods provided by state law inherently affords employees less protection than the six-year limitations period of the FCA, as Karen Wilson's experience attests. While North Carolina's statute of limitations for wrongful discharge actions is three years, some state retaliation statutes provide for limitations periods as short as 180 days. *See, e. g.*, Tex. Health & Safety Code Ann. §§ 161.132, 161.134 (Vernon 2002) (imposing 180-day

period in which to file action alleging retaliation against health-care worker for reporting "conduct that is or might be illegal, unprofessional, or unethical and that relates to the operation of the facility"); *Grand*, 811 F. Supp. at 336 n. 2 [**27] (noting terminating employer's contention that Ohio's 180-day limitations period governs retaliation claims under the FCA should § 3731(b)(1) not apply). Such an abbreviated limitations period may be too short for an employee to adequately marshal the evidence necessary to support a claim that her termination was predicated on protected activity. *Cf. Reed*, 488 U.S. at 323 n. 2, 324, 326 (suggesting that a six-month limitations period provides insufficient time for an aggrieved union member to "identify[ ]the injury, decide in the first place to bring suit against and thereby antagonize union leadership, and find[] an attorney"). Applying state law in lieu of the FCA's limitations period would undermine the very protection that Congress intended to confer by enacting § 3730(h). The dissent does not explain how the purposes of the FCA are served by subjecting either the present or future relators who seek to vindicate federal interests to the vagaries of a patch-work of state limitations periods, some as short as six months.

[*256]Second, the uncertainty inherent in the process of identifying which of several potentially applicable statutes in any given state is "most [**28] analogous" would further undermine the protection afforded by § 3730(h). To make this determination, courts must first "characterize the essence" of the plaintiff's claim, then decide which state

statute provides "the most appropriate limiting principle." *Wilson v. Garcia*, 471 U.S. 261, 268, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985). While we do not doubt the ability of the district courts to follow these considerations to their logical conclusion, we note the frequency with which states have enacted "multiple statutes of limitations for personal injury actions," and the difficulties that can arise in selecting which is most analogous. *See Owens v. Okure*, 488 U.S. 235, 241, 243-44, 102 L. Ed. 2d 594, 109 S. Ct. 573 & n.8, (1989) (noting that in "States with multiple statutes of limitations for personal injury actions," it may be difficult to ascertain which is most analogous, and that courts of appeals had devised two different approaches when resolving this issue in § 1983 actions). The collateral litigation necessary to resolve this issue would exacerbate any uncertainty as to the time available for filing a retaliation claim, and thereby reduce the employee's incentive to report [**29] a violation of § 3729. *Cf. Reed*, 488 U.S. at 326 ("Time-consuming litigation as to the collateral question of the appropriate statute of limitations for a § 101 claim ...creates uncertainty as to the time available for filing, and it would not be surprising if the prospect of perhaps prolonged litigation against the union before ever the merits are reached were to have a deterrent effect on would-be § 101(a)(2) plaintiffs.").

Third, the Appellees overlook the additional uncertainty that choice-of-law issues would create for employees in deciding whether to report violations of § 3729. Reference to state statutes of limitations may require district courts to

address choice of law issues in determining which state's law it must look to before selecting the appropriate state statute. *Cf. Ackley*, 110 F. Supp. 2d at 402-03 & n. 7 (disagreeing with defendant's argument that Maryland's *lex loci delicti* choice-of-law rule applied and required recourse to New York's one-year limitations period, and collecting cases for and against proposition that the most analogous statute is to be identified from the forum state's code, rather than following an application [**30] of the forum state's choice-of-law rules). Forcing an employee to confront complicated choice-of-law issues in deciding what protection, if any, the FCA will provide should she disclose a violation of § 3729 further dilutes the incentive to report such violations that Congress intended to create by adding § 3730(h). The importance of this consideration is underscored by the legislative history of the 1986 amendments, which note that much of the fraud against the government is committed by large contractors with a presence in several states. *See* S. Rep. at 2-3, *reprinted in* 1986 U.S.C.C.A.N. at 5267. Hence, recourse to a single, consistent statute of limitations would be consonant with the purposes of the FCA.

VI.

For the foregoing reasons, we conclude that § 3731(b)(1) provides the limitations period for retaliation actions under § 3730(h). Accordingly, we vacate the district court's orders granting the Appellees' motion to dismiss Wilson's retaliation claim as time-barred as well as denying reconsideration of

that dismissal, and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED

[*257] WILKINSON, Circuit Judge, dissenting: [**31]

I thank Judge Duncan for her fine opinion. This is not an easy case, and there exists a square conflict between the Ninth Circuit, *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1035 (9th Cir. 1998) (state statute of limitations for wrongful discharge applies to anti-retaliation claims under section 3730(h)), and the Seventh Circuit, *Neal v. Honeywell, Inc.*, 33 F.3d 860, 865 66 (7th Cir. 1994) (six-year statute of limitations in section 3731(b) applies to claims under section 3730(h)). In my judgment, the *Lujan* court advances the better interpretation of the False Claims Act, 31 U.S.C. §§ 3729-3733 (2000). The sole issue in this interlocutory appeal is whether the district court correctly held that North Carolina's three-year statute of limitations for wrongful discharge applies to complaints of retaliatory conduct brought under section 3730(h) of the FCA. reasons expressed by both *Lujan* and the district court, I agree that the three-year limitations period applies.

My colleagues, by contrast, hold that under section 3731(b) an employer's submission of false claims commences a six-year statute [**32] of limitations for the independent event of retaliation against an employee. The majority thus introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts

themselves. The majority offers a number of policy rationales to support its result. But these rationales are found nowhere in the text of the FCA and rest on scant support in the legislative history.

The majority suggests its approach to the statute has this or that advantage, but I do not think it acknowledges adequately all the debits of its departure from the statutory text. Its approach fails to give employees adequate notice concerning when the statute of limitations begins. Worse still, it may preclude challenges to retaliatory acts under section 3730(h) before that cause of action has even accrued. The majority also undermines the entire basis for a statute of limitations by counseling judges to exercise equitable tolling powers to recognize claims whenever the drawbacks of its interpretation of the FCA become too apparent to ignore.

And, of course, six years is a long time. Deaths, departures, and forgetfulness can [**33] occur in such a period, and the relevant evidence has often faded. That is not to say that Congress could not mandate such a period, only that it has not chosen a time frame so far in excess of analogous state provisions.

So I believe the majority is mistaken. In the absence of an express federal statute of limitations, the district court properly applied the statute of limitations for the most closely analogous state action of wrongful discharge. *See Reed v. United Transportation Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989). North Carolina's three-year statute of limitations for wrongful discharge

affords a whistle-blowing employee both adequate notice and a reasonable period of time to file anti-retaliation claims.

I.

A.

The starting point for our inquiry must be the text of the statute. The FCA's sole statute of limitations provision states:

> (b) A civil action under section 3730 may not be brought -
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or [*258] (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United [**34] States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b). Since anti-retaliation claims under section 3730(h) are part of section 3730, my colleagues contend a plain reading suggests that the statute of limitations applies. But "the answer is not so simple." *Lujan*, 162 F.3d at 1034.

Unfortunately, the majority's purported plain language interpretation lops off half the statute. It overlooks the fact that both prongs of the statute of limitations turn explicitly on events independent from any alleged retaliatory actions.

This fact alone suggests that the statute of limitations does not apply to anti-retaliation claims.

The first statutory limitations period begins with the occurrence of a section 3729 violation. 31 U.S.C. § 3731(b)(1). The text of this provision could not be more plain. The six-year period is tied to a "violation of section 3729" and nothing else. Because an anti-retaliation claim does not involve a "violation of section 3729" but instead a violation of [**35] section 3730(h), by its own terms section 3731(b)(1) cannot apply. Section 3729 addresses only the submission of false claims to the federal government. Section 3729 does not address retaliatory actions by employers against whistle-blowing employees. Indeed, an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of section 3729 violations, which would leave this statute of limitations without a starting point. Retaliation by an employer may also occur more than six years after the employer committed the false claims violations, which would leave the employee without a cause of action. Therefore, it seems incongruous to say the least that an employee's ability to bring retaliatory claims should turn on when or whether the employer has submitted false claims to the government in violation of section 3729. *See United States ex rel. Ackley v. International Business Machines Corp.*, 110 F. Supp. 2d 395, 401-03 (D. Md. 2000).

The second statutory limitations provision also has nothing to do with anti-retaliation claims under section 3730(h). *See* 31 U.S.C. § 3731(b)(2). This alternative statute of limitations

[**36] commences on the date when federal officials charged with responsibility to act under the FCA knew or reasonably should have known material facts concerning the section 3730 claim. But this is a logical impossibility in the case of section 3730(h) claims. No United States official is responsible for anti-retaliation claims under section 3730(h), and no official can even file an anti-retaliation action on behalf of an affected employee. A whistle-blowing employee is the only individual empowered to bring challenges to retaliatory actions under section 3730(h). Therefore, it would seem impossible to link the statute of limitations for anti-retaliation claims to this provision.

In sum, applying either of the section 3731(b) limitations periods to section 3730(h) anti-retaliation actions is like cramming squares in circles. In neither language nor logic do they fit.

B.

Prior to 1986, section 3731(b) stated that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982). This pre-1986 [*259] provision clearly established that a six-year statute of limitations applied to all [**37] section 3730 claims.

If Congress had retained this language when it added anti-retaliation actions to the FCA, then our job would be simple. But Congress in 1986 chose to amend the FCA, and we must "presume that language added by amendment was not mere surplusage." *Salomon Forex, Inc. v. Tauber*, 8 F.3d 966, 975

(4th Cir. 1993). Congress introduced in 1986 a cause of action for retaliatory acts under section 3730(h). Simultaneously, Congress revised the statute of limitations provision under section 3731(b) in two significant ways.

First, Congress narrowed the applicability of the statute of limitations to "violations of section 3729." *See* 31 U.S.C. § 3731(b)(1). If Congress had intended that a six-year statute of limitations apply to section 3730(h) anti-retaliation actions, it would not have made an employer's false claims violations the thing that starts the statute running. Second, Congress would not have added the alternative provision that the statute of limitations for section 3730 runs three years after an official knew or reasonably should have known of facts material to the right of action. *See* 31 U.S.C. § 3731 [**38] (b)(2). Both of these changes mean that the statute of limitations applies only to section 3730 claims that concern the employer's false claims violations under section 3729 and not to challenges to retaliatory acts brought by an employee under section 3730(h). To decide otherwise suggests that this statutory change is meaningless and contravenes the well-established rule that "when Congress alters the wording of a statute, we must presume Congress intended a change in the law." *Lackey v. Johnson*, 116 F.3d 149, 152 (5th Cir. 1997).

The majority asserts that "§ 3730(h) subsumes a violation of § 3729, even if it does not do so explicitly." Maj. op. at 9. This is an implicit argument, and we do not interpret cross-references in statutes in this fashion. We must presume that when Congress incorporates statutory cross-references, it is

careful in laying out the provisions to which the references occur. Here the references in section 3731(b) include section 3729, but do not include section 3730(h). When Congress includes one provision, it is safe to assume that it excludes others, absent evidence to the contrary. *Russello v. United States*, 464 U.S. 16, 23, 78 L. Ed. 2d 17, 104 S. Ct. 296 (1983). [**39] While this principle may not serve as an infallible guide to statutory interpretation, it surely applies here.

My colleagues also point to a piece of legislative history, which indicated the Senate's initial intent to place whistle-blower protections under a separate section of the FCA. *See* Maj. op. at 10-11. The majority claims that the ultimate inclusion of challenges to retaliatory acts under section 3730(h) suggests that Congress somehow decided that section 3731(b) would establish the statute of limitations for these claims. This interpretation rests on a negative inference, and nothing affirmatively suggests that Congress added anti-retaliation claims to section 3730 with this purpose in mind.

In an effort to explain its conclusion, the majority states that Congress was, in effect, enacting a statute of repose. Maj. op. at 12. But, of course, Congress was doing nothing of the sort. Indeed, it is startling for the majority to suggest that Congress was bent, in the FCA no less, on establishing "repose" for employers who first defrauded the government and then moved against the very persons who brought that

fraud to light. Section 3731(b) is self-evidently a statute of limitations. [**40]

The majority implies that when it picked the point to start the limitations period, [*260] Congress either did not know the difference between sections 3729 and 3730, or that it inadvertently neglected to include a reference to an immediately adjoining section of the statute. There is another explanation, however - namely that Congress did not include a reference to section 3730 because it did not wish to include such a reference. The actual statutory changes that Congress did enact underscore the point that Congress did not intend for section 3731(b) to apply to section 3730(h) claims. As the *Lujan* court held, "in the absence of some meaningful indication to the contrary, we must therefore presume that, in amending section 3731(b) so that the limitation runs only from the date of a violation of section 3729, Congress did not intend that the statute apply to section 3730(h)." *Lujan*, 162 F.3d at 1035.

C.

The majority's interpretation is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts. *See, e. g.*, N.C. Gen. Stat. § 1-52(5)(2003); Va. Code Ann. § 8.01-248 [**41] (2003); W. Va. Code § 55-2-12 (2003). By holding that the statute of limitations for anti-retaliation actions is set in motion by some independent event, rather than by the retaliatory acts themselves, the majority denies employees adequate notice of when they can bring a claim. Indeed, the

majority's interpretation may fail to provide any notice *at all* to employees as to when their claims may commence or be foreclosed. There is a reason that statutes of limitations for anti-retaliation actions begin with the alleged retaliatory event. Because the retaliation bears adversely on the affected employee, it serves as the best possible notice that the employee may henceforth seek redress.

This same reason suggests why Congress did not mandate a six-year statute of limitations for section 3730(h) actions. Since false claims themselves are acts of deception, it makes sense for a longer statute of limitations to provide time to uproot the deception. But this is simply not a concern for employees under section 3730(h) who will feel the sting of the retaliatory actions at the moment they occur.

The matter seems almost second-nature. Statutes of limitations for [**42] personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin to run on the date of the discharge. In an action challenging a wrongful act, the limitations period generally begins on the date of the act. In short, I am unable to understand why my friends in the majority go to such extraordinary lengths to resist such a thoroughly ordinary principle.

The majority's interpretation also casts uncertainty over the ability of affected employees to raise claims. For example, under its interpretation a whistle-blowing employee could report on his employer's submission of a false claim some five years or more after the claims were submitted, yet be

fired with apparent impunity just months later. The problem is thus that the existence of an independent trigger for the statute of limitations narrows the window of opportunity for affected employees to make challenges to retaliatory actions under section 3730(h). My colleagues summon judges to exercise their equitable tolling powers in such instances to override the limitations period in the interests of justice. But the idea that a statute of limitations could expire even before the [**43] cause of action comes into being is not one that we should jump to conclude that Congress intended to embrace. Reliance on equitable tolling in these circumstances undermines the value of having a statute [*261] of limitations in the first place and vests courts with unpredictable discretion with regard to late claims. The uncertainties of equitable tolling may make it more difficult for discharged whistle-blowers to secure legal representation. Lawyers may be reluctant to take on late challenges to retaliatory actions if there is only a chance that judges will exercise equitable tolling powers to recognize them.

The majority chides the dissent for manifesting a concern about future employees and not the employee in this case. But efforts to rescue a present plaintiff cannot justify creating problems for future plaintiffs that Congress did not intend. My colleagues respond to these problems with various policy pronouncements. The majority posits that Congress chose to have section 3731(b) apply to anti-retaliation actions under section 3730(h) to further "simplicity of administration." Maj. op. at 9-10. Nowhere in

the statute or legislative history is Congress' desire for simplicity of administration [**44] articulated. Simplicity of administration is certainly not furthered by the majority's exhortation for judges to use equitable tolling. Nor is simplicity of administration advanced by the majority's discussion of what actually constitutes a "violation" of section 3729. Maj. op. at 14-15. In this connection, we are told we need not await a judicially determined violation, but what other than that might suffice to set the statute running is left unclear. And to have all this in the course of a discussion on administrative ease and convenience underscores the fact that the majority's interpretation will present us with anything but.

In support of its result, the majority claims there is generally a close temporal relationship between protected acts and retaliatory conduct, and that it is easier to know when fraud against the government occurs than when retaliatory actions occur. Maj. op. at 9. These arguments are speculative. Whether false claims or retaliatory actions are easier to identify will depend on which claim or which action one happens to be talking about. And as for the "close temporal relationship between a protected act and the retaliatory conduct based on it," Maj. op. [**45] at 13, an employer, and especially one aware of the majority's limitations rule, could resolve not to "get mad," but in the longer run "to get even." The majority finally argues that "the length of the limitations period in § 3731(b)(1) lessens the likelihood that the purportedly absurd consequences advanced by the Appellees

would occur." Maj. op. at 13. This too is hardly self-evident, because the discovery of false claims, predicated on deceptive practices, may not occur until late in the day. In all events, these sorts of judgments are legislative, not judicial in nature, and they afford no basis for ignoring the fact that Congress pegged the six-year limitations period to violations of section 3729, not section 3730(h), in the statute itself.

II.

"Congress not infrequently fails to supply an express statute of limitations when it creates a federal cause of action. When that occurs, 'we have generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law.'" *Reed*, 488 U.S. at 323 (quoting *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 158, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983)). [**46] Since Congress enacted section 3730(h), but provided no statute of limitations, we must apply state law where the retaliatory actions took place. The North Carolina statute concerning wrongful discharge is the most analogous provision for a retaliatory discharge under the FCA. *See Renegar v.* [*262] *R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 549 S.E. 2d 227, 229 (N.C. Ct. App. 2001). The three-year statute of discharge should therefore apply and begin at the time the discharge in this case took place. *See* N.C. Gen. Stat. § 1-52(5) (2003). The challenge to the retaliatory action here occurs almost four years after this point and should thus be time-barred.

In applying state law, "'[i]t is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national polices.'" *Reed*, 488 U.S. at 324 (quoting *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 367, 53 L. Ed. 2d 402, 97 S. Ct. 2447 (1977)). Application of the state statute of limitations in this context would not "frustrate or interfere with the implementation of national policies" or "be at [**47] odds with the purpose or operation of federal substantive law." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34, 132 L. Ed. 2d 27, 115 S. Ct. 1927 (1995) (internal quotations and citations omitted). In fact, this standard would make it easier for affected employees to challenge retaliatory actions, because they would at least know when they could do so. By contrast, the majority's interpretation leaves in the dark plaintiffs who seek to bring the dealings of those who defraud the government to light.

The majority points out that state statutes of limitations vary in duration and that a few states, such as Ohio, have a statute of limitations period for wrongful discharge as low as 180 days. But we are not thereby entitled to abandon the statutory text whenever a federal court perceives that a state steps "out of line." It is altogether plausible that Congress chose to respect both the diverse views of states on the length of limitations periods for wrongful discharge and the consensus view of states that such periods, whatever their length, should run from the date of the retaliatory acts themselves. Of course, Congress could provide a uniform time-period for

these actions anytime [**48] it chooses to do so. But federal uniformity has never been thought an indispensable feature of federal law. *See, e. g.*, Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680. Other federal statutes, such as the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983, have required courts to identify the most analogous state causes of action and to apply state statutes of limitations to federal claims. *See Owens v. Okure*, 488 U.S. 235, 239-40, 245-48, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989) (section 1983 actions are governed by state general or residual personal injury statutes of limitations); *see also Reed*, 488 U.S. at 326-27 (claims under § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(2), prohibiting unions from interfering with members' right to free speech as to union matters, are governed by state general or residual personal injury statutes).

Any difficulties with applying state law suffer in comparison to the difficulties which the majority has created. In some cases, the majority's new rule may be clear, but in others it will cause uncertainty, [**49] and in still others it will discourage or prevent deserving whistle-blowers from having their day in court. Congress may deem it necessary and appropriate to extend the time frame for anti-retaliation claims well beyond those which individual states provide. But until it does so, I would adhere to what I respectfully believe is its presently expressed intent.

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1122
(CA-01-19-2)

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Defendants-Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR;

PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, DECIDED APRIL 29, 2004

JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99,

Defendants.

ORDER

The court amends its opinior filed April 29, 2004, as follows:

On page 8, footnote 6, in line 1 of paragraph 1 and lines 1 and 5 of paragraph2: the word "canons" replaces "cannons."

For the Court - By Direction,

/s/ Patricia S. Connor
Clerk

ORDER (AMENDING PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT), DATED MAY 25, 2004

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-1122
(CA-01-19-2)

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON,

Plaintiff-Appellant,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Defendants-Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR; BERNICE ORR;

ORDER (AMENDING PUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT), DATED MAY 25, 2004

JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99,

Defendants.

ORDER

The court further amends its opinion filed April 29, 2004, and amended May 10, 2004, as follows:

On page 11, footnote 10, line 2, "*Post* at 18." is added after the first sentence. On page 12, line 1 of the footnote, "Certainly, arrangement that follows" is corrected to read "Certainly, the arrangement that follows."

For the Court - By Direction,
/s/ Patricia S. Connor
Clerk

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION

CIVIL NO. 2:01CV19

UNITED STATES *EX REL.*, KAREN T. WILSON
Plaintiffs,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; RICHARD GREENE; CHERIE GREENE; WILLIAM TIMPSON; RICKY STILES; KEITH ORR; BETTY JEAN ORR; RAYMOND WILLIAMS; DALE WIGGINS; JOYCE LANE; GERALD PHILLIPS; ALLEN DEHART; JIMMY ORR; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; BILL TIPTON; LLOYD KISSELBURG; CI. B. NEWTON; EDDIE WOOD; TED ORR; BERNICE ORR; JOHN DOE AND JOHN DOE

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

CORPORATIONS; and GOVERNMENTAL ENTITIES 1-99,

Defendants.

MEMORANDUM OF OPINION

THIS MATTER is before the Court on objections filed by Relator Karen T. Wilson (Wilson) to the memorandum and Recommendations of the United States Magistrate Judge Max O. Cogburn, Jr. Defendants Graham County Board of County Commissioners (the Graham County Board), Raymond Williams (Williams), Dale Wiggins (Wiggins), and Lynn Cody (Cody) (collectively "responding Defendants") have filed timely responses to Wilson's objections. Pursuant to standing orders of designation and 28 U.S.C. § 636, this Court referred the following motions to the Magistrate Judge for a recommendation as to disposition: (1) motion to dismiss filed by the Graham County Board, Williams, Wiggins, and Cody; (2) motions to dismiss and for a more definite statement filed b Defendants Cherokee county Soil & Water Conservation District (the Cherokee County District), Bill Tipton (Tipton), Eddie Wood (Wood), and C. B. Newton (Newton); (3) motion to dismiss filed by Defendants Cherokee County Board of County Commissioners (the Cherokee County Board), Charles Laney (Laney), Eugene Morrow (Morrow), and George Postell (Postell); (4) motion to dismiss of Defendants Graham County Soil & Water Conservation District (the

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

Graham County District), Gerald Phillips (Phillips), Allen Dehart (Dehart), Jimmy Orr, and Lloyd Millsaps (Millsaps); and (5) motion to amend the complaint filed by Wilson. The Magistrate Judge filed a recommendation that the motions to dismiss the action filed by the Cherokee County Board, the Cherokee County District, the Graham County Board, the Graham County District (collectively "the municipal governmental entities" or "the municipal entities"), and those individuals who serve on those municipal entities at the relevant times be granted in part; the motions to dismiss filed by the municipal entities and the individual Defendants, in their official capacities, be allowed on the grounds of municipal immunity from punitive damages. The Magistrate Judge further recommended that the motions to dismiss the Defendants in their individual capacities be denied.[1] The Magistrate Judge recommended that Wilson's motion to amend her complaint to comply with the requirements of F. R. Civ. P. 9(b) be granted.

The district court conducts a *de novo* review of those portions of a Magistrate Judge's Memorandum and

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[1] The Magistrate Judge noted that the real parties in interest were not the County Boards, but rather Graham County and Cherokee County. If this Court determined that the municipal entities were not found to be immune from punitive damages, the Magistrate Judge recommended allowing Wilson to amend her complaint to insert the counties themselves as Defendants in place of the Boards. The Magistrate Judge also recommended that these amendments would relate back to the date the original complaint was filed. The Court adopts these recommendations.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

Recommendation to which specific objections are filed. ***See* 28 U.S.C. § 636(b)**. This Court will not address general objections to the Magistrate Judge's final Recommendation. "A general objection...has the same effect as would a failure to object. The district court's attention is not focused on any specific issues for review, thereby making the initial reference to the magistrate useless." ***Howard v Secretary of HH*, 932 F.2d 505, 509 (6th Cir. 1991)**. In this Circuit, *de novo* review is unnecessary "when a party makes general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." ***Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982)**. Those parts of a Magistrate Judge's Memorandum and Recommendation to which no specific objections are filed are given careful review. ***Id.***

Wilson timely filed two specific objections to the Magistrate Judge's recommendations. First, Wilson objects to the determination that the False Claims Act (FCA), 31 U.S.C § 3729, *et seq.*, did not abrogate municipal immunity on the grounds that the Magistrate Judge failed to give the proper deference to the position taken by the Department of Justice as *amicus curiae* under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). She also objects to the Magistrate Judge's conclusion that the Fourth Circuit would not find a line of cases in other Circuits – holding that F.R.Civ.P. 9(b)'s pleading requirements are loosened in similar situations – to be persuasive authority. For the reasons stated herein, the motions to dismiss are granted in part and denied in part.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

I. FACTUAL AND PROCEDURAL HISTORY

The Plaintiff Wilson, a former employee of the Graham County District, alleges that the Defendants, in various combinations, submitted false claims to three different programs, *i.e.*, "EWP-216," a federal Emergency Watershed Protection program implemented in the wake of a 1995 storm and the federally funded North Carolina Cost Share and Farm Services Agency programs. She claims some of the Defendants submitted claims for work that was never done, submitted claims for work that was improperly bid, submitted claims for materials that were never used, or failed to report proceeds of timber sales where the timber was removed as a part of the program. She further alleges that other Defendants assisted in procuring funds based on these claims and in covering up the malfeasance. Wilson alleges that she attempted to bring these charges to light, and her employer and co-workers harassed her in retaliation, resulting in her constructive discharge. As such, she asserts two causes of action, a *qui tam* claim for violation of § 3279 and a claim of FCA retaliation und § 3730(h).

Wilson filed her sealed complaint on January 25, 2001. Pursuant to 31 U.S.C. § 3720(a)(4), the United States filed Notice of Election to Decline Intervention on July 23, 2001. After service of process was had on Defendants, the last of the instant motions was filed on January 22, 2002; after a hearing held February 20, 2002, the Magistrate Judge filed his Memorandum and Recommendation on March 25, 2002.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

II. STANDARD OF REVIEW

In ruling on a motion to dismiss for failure to state a claim, the Court must "accept the factual allegations in the plaintiffs' complaint and must construe those facts in the light most favorable to the plaintiffs...[Dismissal may occur] only if it appears beyond doubt that the plaintiffs can prove n set of acts in support of their claim that would entitle them to relief." ***Flood v. New Hanover County*, 125 F.3d 249, 251 (4th Cir. 1997); *Shepard's, Motions in Federal Court*, § .124, at 367 (2d ed. 1991).** "To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint need only outline a recognized legal or equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence and which, if proven, will justify some form of relief." ***Id.*, § 5.123, at 366.** If "relief could be granted under any set of facts that could be proved consistent with the allegations," the motion must be denied. ***Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).** Conversely, if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. . .a claim must be dismissed." ***Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (citing *Hishon, supra*).**

III. DISCUSSION

A. Municipal Immunity

Wilson's objection regarding municipal immunity is that, during the pendency of these motions, the Seventh Circuit Court of Appeals ruled on the same question, crating a split among the Circuits which have ruled on this issue to date.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

***See United States ex rel. Chandler v. Cook County, Illinois*, 277 F.3d 969 (7th Cir. 2002) (finding no municipal immunity), mandate sayed, 282 F.3d 448, *petition for cert. filed*, 70 U.S.L.W. 3670 (Apr. 19, 2002); *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 244 F.3d 486 (5th Cir. 2001) (finding municipal immunity), *cert. denied*, 122 S. Ct. 808 (Jan. 7, 2002); *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219 (3rd Cir. 2002) (finding no municipal immunity)**. She argues the conflict among the Circuits provides this Court with a "strong indication" that the FCA is ambiguous on this issue and that the Court should defer to the interpretation of the FCA as set forth by the Justice Department in it *amicus curiae* brief. ***See Smiley v. Citibank* (South Dakota) N.A., 517 U.S. 735, 739 (1996)**.

In many instances of statutory ambiguity, courts are required to afford a level of deference to the interpretation of a statute by the relevant governmental agency. ***See, e.g., United States v. Mead Corp.*, 533 U.S. 218 (2001); *Chervon U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore, supra*.** The responding Defendants are willing to concede that the Court should apply *Skidmore* deference. **Opposition of "Responding Defendants" at 1 ("although *Skidmore* analysis is entirely appropriate given the intra-circuit conflict . . .".)**. The Court, however, is not convinced that the Justice Department's position should be afforded deference in this situation.

MEMORANDUM OF OPINION (COURT ALLOWING DEFENDANTS' MOTION TO DISMISS), DATED MAY 30, 2002

The level of deference courts afford to statutory interpretations by agencies of the Executive Branch attempting to resolve ambiguous language in a statue varies with the degree to which Congress has delegated the authority to implement a statute to an Executive agency. In the modern, regulatory federal bureaucracy, this is frequently an express of implied grant of authority to craft rules which bear the force of law. In this situation, courts grant agency determinations *Chevron* deference. ***See, Chevron, supra.***

> We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, *when it left ambiguity in a statute meant for implementation by an agency*, understood that the ambiguity would be resolved, first and foremost, by the agency, and desire the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

***Smiley*, 517 U.S. at 470-41 (emphasis added)**. The Supreme Court has recently restated this rule.

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress *delegated authority to the agency*

> *generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.* Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

***Mead Corp.*, 533 U.S. at 226-27 (emphasis added).**

Where Congress has not delegated such authority, courts must still give agency interpretations of regulatory or implementing statutes *Skidmore* deference.

> There is room at least to raise a *Skidmore* claim here, where the *regulatory scheme is highly detailed*, and Customs can bring the *benefit to specialized experience* to bear on the subtle questions in this case . .. .

***Id.*, at 235 (emphasis added).**

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

***Skidmore*, 323 U.S. at 140**. Even *Skidmore* deference, however, is limited to the situation where an agency issues

"opinion letters . . .policy statements, agency manuals, [or] enforcement guidelines" interpreting a statute which it was created to help implement or which has been especially charged to that agency given its unique expertise. ***Christensen v. Harris Co.*, 529 U.S. 576, 587 (2000).**

> But the [agency interpretation is] made in pursuance of official duty, *based upon more specialized experience and broader investigations and information that is likely to come to a judge in a particular case.* [It] determine[s] the policy which will guide applications for enforcement by injunction on behalf of the Government.

***Skidmore*, 323 U.S. at 139-40 (emphasis added).** "[D]eference is often appropriately give to an agency's interpretation of *its governmental statute*." ***Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (emphasis added).** These cases frequently involve agencies making determinations involving procedural aspects of their enforcement or regulatory duties. ***See, e.g., Christensen, supra; Meade Corp., supra; Admas v. S.E.C.*, 287 F.3d 183, 188-89 (D.C. Cir 2002) (giving *Skidmore* deference to the Administrative Conference's "Model Rules for Implementation of the Equal Access to Justice Act," 51 Fed.Reg. 16, 659 (May 6, 1986).**

The FCA does not establish a "highly detailed" "regulatory scheme." ***Mead Corp.* 533 U.S. at 235**. While

the Justice Department is granted the power to enforce the FCA, nothing about the Act, or the Justice Department, indicates any specialized information in the hands of the Justice Department which would give its interpretation of the FCA more weight. The Justice Department's power to enforce the FCA is more analogous to it power to enforce criminal statutes – such as the Controlled Substances Act, 21 U.S.C. § 801*et seq.* – than it is to the Equal Employment Opportunity Commission's power to establish procedures to enforce the Fair Labor Standards Act or the Environmental Protection Agency's power to establish regulations under the Clean Air Act. ***See, Christensen, supra; Chevron, supra.*** In fact, the FCA originally provided for both criminal and civil penalties until 1874 when the criminal provisions were re-codified. ***See,* U.S. REV. STAT. tit. 36, § 3490 (1875) (civil); *id.* tit. 70, § 5438 (criminal); *Untied States v. Southland Mgmt. Corp.*, 288 F.3d 665, 2002 WL 538779, *6 (5th Cir. 2002).** Particularly in regards to the issue at bar, there is not indication that the Justice Department possesses any "specialized experience" or "broader investigation or information" than is "likely to come to" this Court is this case. ***Skidmore, supra.*** If the Justice Department established guidelines for determining whether to proceed with an action itself or to leave a case under the control of a *qui tam* relator, those guidelines would certainly be entitled to deference. ***See,* 31 U.S.C. § 3730(b)(4).** The determination of whether the FCA has abrogated common law municipal immunity from punitive damages awards,

however, is one particularly suited to the decision making abilities of the federal courts. ***See, Chandler, supra; Garibaldi, supra; Dunleavy, supra; see also, City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).** As such, the Court will grant the *amicus curiae* brief submitted by the Government no greater weight than the positions taken by the litigants.[2]

As such, the basis for Wilson's objection is inapplicable. Regardless, she has made a specific objection to the Magistrate Judge's conclusion regarding municipal immunity and this Court will review that conclusion *de novo.*

The Recommendation provides an excellent overview of the historical development of municipal immunity and the current status of municipal immunity under federal law. The Magistrate Judge concluded that "no punitive damages are allowed [against municipal entities] unless expressly authorized by statute." ***City of Newport*, 453 U.S. at 259 n.21; *Stevens*, 529 U.S. at 781 (holding States immune from FCA liability).** The issue is whether the FCA expressly authorizes punitive damages against municipal entitles.

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[2] It may be, however, that this is all the weight *Skidmore* deference requires. Under that decision, the Court affords agency opinions deference "proportional to its 'power to persuade.'" ***Meade Corp.*, 533 U.S. 235 (quoting *Skidmore*, 323 U.S. at 140).** The argument of any litigant is consistently given respect proportional to its persuasive power, in light of existing precedent.

Although it has undergone several amendments in the last 20 years, the essential liability provision of the FCA has been in place since 1863. ***Stevens*, 529 U.S. at 782-83**. The FCA provides that "[a]ny person" who, *inter alia*, "knowingly presents. . .to an officer or employee of the United States Government. . .a false or fraudulent claim for payment. . .is liable to United States Government." **31 U.S.C. § 3729(a); *Stevens, supra,* at 769**. Congress amended the damages provisions of the FCA in 1986 providing "for a civil penalty not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . .". ***Id.. Stevens*, at 785.** The previous version of the damages provision called for double damages and a $2,00 civil penalty, which the Supreme Court suggested were remedial rather than punitive damages. ***Stevens, supra* (citing *United States v. Bornstein*, 423 U.S. 303, 315 (1976))**. A successful *qui tam* relator under the FCA is entitled to receive up to 25 percent of the "proceeds of the action" if the Government does not intervene and up to 10 percent of those proceeds if the Government elects to intervene. **31 U.S.C § 3730(c)(1-2.**

The Magistrate Judge and the parties correctly agree that the ultimate question in deciding this issue is whether the term "person" in § 3729 includes municipal entitles. The term "person" is presumed to include municipal entities. ***See, Garibaldi*, 244 F.3d at 491 ("we cannot apply [] the presumption that the term person does not include the**

sovereign," because municipalities are distinct from States). This is precisely opposite to the presumption from which the *Stevens* court began in determining that the term "person" in § 3729 does not include the States and that they are, therefore, immune from liability under the FCA. ***Stevens*, 529 U.S. at 780 ("[w]e must apply to this text our longstanding interpretive presumption that 'person' does not include the sovereign")**. Under the *Stevens* decision, "the term 'person' has remained in the statute unchanged since 1863." ***Id.*, at 783 n.12.**

While the *Stevens* court found the legislative history of the 1986 amendments indicating the FCA would apply to the States was incorrect and therefore inapplicable in that decision, that conclusion does not apply to the legislative history as it regards municipalities. ***Id.*** The amendment did not alter the meaning of the term "person". ***Id.*** The determination that the legislative history is "erroneous and of questionable value" relied on by the Magistrate Judge and the Third Circuit in *Dunleavy* is based on the conclusion that the relevant portions of the legislative history had incorrectly determined that "person" was presumed to include the States. ***Id.; Dunleavy*, 279 F.3d at 225.** As it relates to whether the tem "person" includes municipalities, the legislative history is correct and supports the conclusion that Congress knew that "person" included municipalities when it made the 196 amendments. ***Stevens, supra.*** Based on the presumption that the term "person" includes municipal entitles, and the Supreme Court's finding that nothing in the

1986 amendments altered the meaning of that term, the Court concludes that the term "person" as used in § 3729 includes municipalities. As such, the 1988 amendments to the FCA expressly authorize punitive damages against municipal entities, and they are not immune from suit for a violation of § 3729. The motions to dismiss the complaint as *qui tam* relator based on a n assertion or municipal immunity must, therefore, be denied as to all Defendants.

B. Motion to Amend Complaint

1. Fraud Claims and Rule 9(b)

While the Magistrate Judge recommended Wilson's motion to amend complaint be granted, he did so based on the motion for a more definite statement filed by Defendants Cherokee County Board, Tipton, Wood, and Newton. These arguments were also raise by Defendants Graham County, Laney, Morrow, Wiggins, and Cody in their motions to dismiss. These Defendants argued Wilson's original complaint failed to satisfy the requirement of Rule 9(b) that "in all averments of fraud . . ., the circumstances constituting fraud . . . shall be stated with particularly." **Fed. R. Civ. P. 9(b)**. Although the Magistrate Judge concluded that the original complaint did not meet this requirement, he recommended allowing Wilson the opportunity to amend the complaint to bring it into compliance with the Rule. He also recommended allowing Wilson to amend her Complaint to name Cherokee County and Graham County as Defendants rather than the County Boa5rds and that those amendments would relate back to the date of filing of the original

complaint. Not Defendant has objected to this conclusion; and upon careful review, the Court finds it to be appropriate.

Wilson objects to the Magistrate Judge's conclusion that her original complaint did not comply with Rule 9(b), citing to a line of cases and noting that "if the alleged fraud occurred over an extended period of time and consisted of numerous acts, the specificity requirements are applied less stringently." ***United States ex rel. Butler v. Magellan Health Servs., Inc.*, 74 F.Supp.2d 1201, 1215 (M.D. Fla. 1999)**. As the Magistrate Judge correctly noted, the Fourth Circuit has not applied this relaxed standard to FCA cases. ***Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999)**. Even under this less stringent standard, "this exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." ***United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997) (citations and quotations omitted)**. Furthermore, "[a]llegations of fraud may be based on information and belief when the facts in question are peculiarly within the opposing party's knowledge and the complaint sets forth the factual basis for the plaintiff's belief." ***Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1237 (10th Cir. 2000) (citations and quotations omitted)**. Likewise, even where the complaint alleges a widespread or long-running fraud, "[it] must still adduce specific facts supporting a strong inference of fraud or it will not satisfy

even a relaxed pleading standard." ***Butler*, 71 F.Supp.2d at 1215 (citations and quotations omitted)**.

Even under the relaxed standard proposed by Wilson, not only does the original complaint fail to set forth specific facts supporting the allegations of fraud against many of the Defendants sufficient to comply with Rule 9(b), but the proposed First Amended Complaint fall short as well. The complaint does set forth some of the alleged instances of fraud with sufficient particularly, but it does not do so for all Defendants. Nor does the complaint allege that the absence of specificity is because certain information is in the hands of some or all of the Defendants. "[T]he circumstances required to be pled with particularly under Rule 9(b) are the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." ***Harrison*, 176 F.3d at 783-84 (citations and quotations omitted)**. At a minimum, Wilson must allege which fraudulent statements were made by whom, when they are made, what each Defendant gained as a result of these claims, or that she is unable t plead that information with particularity because it is in the control of the Defendants.

2. Conspiracy Claims

The Cherokee County Board, the Graham County Board, Laney, Morrow, Postell, Williams, Wiggins, and Cody also assert that Wilson's claim of conspiracy does not adequately allege the elements of conspiracy and should be dismissed. Conspiracy claims are not covered by Rule 9(b). This

contention is a motion to dismiss pursuant to 12(b)(6) for failure to state a claim. "To establish a civil conspiracy, [Wilson] must [allege] that the Defendants acted jointly in concert and that some overt act was done in furtherance of the conspiracy." ***United States ex rel. Phillips v. Pediatric Servs. of America, Inc.*, 142 F.Supp.2d 717, 733 (W.D.N.C.. 2001)**. These Defendants assert that the complaint merely alleges that they violated the FCA by "perpetrating and participating in, and conspiring to participate in," fraudulent submissions. **Complaint, ¶ 38**. Certainly, this allegation, standing alone, fails to state a claim for civil conspiracy. Taken as a whole, the complaint asserts that at least some of the Defendants did agree to submit some false claims and committed some overt act in furtherance of that agreement; however, none of the moving Defendants appear to be implicated in this conspiracy. Given the overall lack of clarity in the complaint, the large number of Defendants named, and the generalizations made about relevant conduct, the Court will allow Wilson an opportunity to clarify the conspiracy charges as well as the fraud allegations.

The Magistrate Judge admonished both Wilson and her attorneys to consider the strictures of both Rules 9(b) and 11 in formulating their amended complaint. The Court reiterates that admonition. All Defendants' motions to dismiss are denied as to the first cause of action as a *qui tam* relator without prejudice to renewal. Wilson's motion to amend is allowed, but the proposed First Amended

Complaint is rejected as inadequate. She will be allowed 20 days in which to file a Second Amended Complaint, bearing in mind the points raised in the motions to dismiss and the admonitions of the Magistrate Judge and this Court.

C. Statute of Limitations

The Court notes that the Cherokee County Board, the Cherokee County District, Tipton, Wood, Newton, Laney, Morrow, and Postell have moved to dismiss the claim for retaliatory discharge on the grounds that Wilson was never in their employ. The Cherokee County Board, Laney, Morrow, and Postell also raised the statute of limitations as a grounds for dismissal. The Magistrate Judge's Recommendation does not substantively address this issue, stating that "an issue has arisen as to whether the claims of relator were filed within the period of limitations," and that it "may be revisited at an appropriate time." **Memorandum and Recommendation, at 2, n.2.**

> A civil action under the FCA may not be brought
> (1) more than 6 years after the date on which *the violation of section 3729* is committed, *or*
> (2) more than three years after the date when facts material to the right of action are known or reasonably should have been known by the *official of the United States charged with responsibility to act in the circumstances*, but in no event more than ten years after the date on which the violation is committed, *whichever occurs last.*

31 U.S.C. § 3731(b) (emphasis added). The phrase "official of the United States charged with the responsibility to act" means "pertinent Department of Justice officials." ***United States v. Tech Refrigeration*, 143 F.Supp.2d 1006, 1009 (N.D. Ill. 2001).** However, "there may be circumstances in which the knowledge of government agencies other than the Department of Justice might trigger the running of the FCA statute of limitations." ***Id.*, at 1010.** This statute provides for aq six year statute of limitations, but includes a tolling provision in the event that fraudulent claims go undiscovered for a considerable period of time. The statute of repose sets the outer limit for FCA claims at ten years.

Currently there is a division among the federal courts as to the correct application of this section to FCA claims made by *qui tam* relators. ***United States ex rel. Colunga v. Hercules, Inc.*, 1998 WL 310481 (D. Ut.) (Holding that the tolling provision of § 37371(b)(2) does apply to *qui tam* relators, but that the relevant knowledge for purposes of calculating time is the knowledge of the "official of the United States"); *Unites States ex rel. Saaf v. Lehman Bros.*, 123 F.3d 1307 (9th Cir. 1997); *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996); *United States ex rel. Downy v. Corning, Inc.*, 118 F.Supp.2d 1160 (D.N.M. 2000) (all holding that the tolling provision of § 3731(b)(2) does apply to relators, but that the timing of the *relator's* knowledge controls its application to a *qui tam* action); *United States ex rel.***

***Thistlethwiate v. Dowty Woodville Polymer, Ltd.*, 6 F.Supp.2d 263 (S.D.N.Y. 1998); *United States ex rel. El-Amin v. George Washington University*, 26 F.Supp.2d 162 (D.D.C. 1998) (holding that the tolling provision of § 3731(b)(2) does not apply to *qui tam* actions at all, leaving only the 6 year limitation of § 3731(b)(1))**. The Court adopts the Ninth Circuit's approach to this question as reflected in *Hyatt* and *Saaf*. As such, any claims alleged by Wilson as a *qui tam* relator for conduct which occurred before January 25, 1995, are time barred, unless she did not know or reasonably should not have known of facts material to the action before January 26, 1998. ***See, Downy*, 118 F.Supp.2d at 1171 ("the limitations provisions of Section 3731 are referring to the relator's initial act of filing the civil action, not to the later date when the complaint is unsealed")**.

In reviewing the Complaint, several of Wilson's allegations appear to fall outside this period of limitation. She alleges that Defendants Greene, Timpson, Orr, and others submitted false claims to the Agricultural Cost Share Program beginning in 1993. **Complaint, ¶ 48**. She also does not specify when any false claims were submitted to the Farm Services Agency Program. It is also worth noting that, on the face of the Complaint, Wilson alleges that Greene and Orr knew that she was contemplating "reporting them" on November 6, 1995. **Complaint, ¶ 57**. If Wilson was contemplating reporting conduct relevant to some of her FCA claims in November 1995, she was aware facts

"material" to those particular claims well more than 3 years before her Complaint was filed. Any such claims are hereby dismissed and need not be included in an Amended Complaint.

Additionally, Defendants Cherokee County Board, the Cherokee County District, Tipton, Wood, Newton, Laney, Morrow, and Postell argue that § 3731(b) does not apply to Wilson's claim under § 3730(h) for retaliatory discharge, citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). The Ninth Circuit in *Lujan* found that Congress intended to exclude § 730(h) form the provisions of § 3730(b), based on the language of the two sub-sections, both of which were added to the FCA by the 1986 amendments. ***Id.*, at 1034-35**. The 1986 amendments changed the language of § 3731(b) to include the following limitation, "6 years after the date on which the violation *of section 3729* is committed. . .". ***Id.* (emphasis added)**. Because a retaliation claim is not a violation of § 3729 but rather a violation of § 3730(h), the Ninth Circuit reasoned that § 3731(b) did not apply to the retaliation claims under § 3731 at all. ***Id.*, at 1035**. As such, the *Lujan* court decided to "apply the most closely analogous statute of limitations under state law." ***Id.* (citing *Reed v. United Transport Union*, 488 U.S. 319, 323 (1989))**. Application of § 3731(b) to a retaliation claim would lead to some absurd or incomprehensible outcomes. For example, an employee raising FCA claims which later prove to be unfounded but who was discharged for raising those allegations might be

precluded from false claims to the Agricultural Cost Share Program beginning in 1993. **Complaint, ¶ 48**. She also does not specify when any false claims were submitted to the Farm Services Agency Program. It is also worth noting that, on the face of the Complaint, Wilson alleges that Greene and Orr knew that she was contemplating "reporting them" on November 6, 1995. **Complaint, ¶ 57**. If Wilson was contemplating reporting conduct relevant to some of her FCA claims in November 1995, she was aware facts "material" to those particular claims well more than 3 years before her Complaint was filed. Any such claims are hereby dismissed and need not be included in an Amended Complaint.

Additionally, Defendants Cherokee County Board, the Cherokee County District, Tipton, Wood, Newton, Laney, Morrow, and Postell argue that § 3731(b) does not apply to Wilson's claim under § 3730(h) for retaliatory discharge, citing *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). The Ninth Circuit in *Lujan* found that Congress intended to exclude § 3730(h) from the provisions of § 3730(b), based on the language of the two sub-sections, both of which were added to the FCA by the 1986 amendments. ***Id.*, at 1034-35**. The 1986 amendments changed the language of § 3731(b) to include the following limitation, "6 years after the date on which the violation *of section 3729* is committed." ***Id.* (emphasis added)**. Because a retaliation claim is not a violation of § 3729 but rather a violation of § 3730(h), the Ninth Circuit reasoned

that § 3731(b) did not apply to retaliation claims under § 3731 at all. ***Id.*, at 1035**. As such, the *Lujan* court decided to "apply the most closely analogous statute of limitations under state law." ***Id.* (citing *Reed v. United Transport Union*, 488 U.S. 319, 323 (1989))**. Application of § 3731(b) to a retaliation claim would lead to some absurd or incomprehensible outcomes. For example, an employee raising FCA claims which later prove to be unfounded but who was discharged for raising those allegations might be precluded from bringing a § 3730(h) claim at all. An employer would argue that no § 3729 violation occurred, meaning that the statute of limitations never began to run, crating the inference that no cause of action ever accrued tot he employee for a violation of § 3730(h). ***See, United States ex rel. Ackley v. IBM, Corp.*, 110 F.Supp.2d 395, 401-02 (d. Md. 2000) (noting this and other unusual results from a literal application of § 3731(b) to a § 3730(h) claim and applying Maryland law under the holding of *Lujan*.)**. As such, this Court will apply the most closely analogous state statute of limitations.

Under the North Carolina law, the statute of limitations on a claim for wrongful discharge is three years from the date of discharge. ***Renegar v. R. J. Reynolds Tobacco Co*, 145 N.C. App. 78, 79, 549 S.E.2d 227, 229 (2001) ("It is undisputed that the statute of limitations for a wrongful discharge action under North Carolina law is three years from the date of discharge.") (*citing* N.C. Gen. Stat. § 1-52(5) (1999))**. As such, the time for Wilson to bring her

claim for retaliatory discharge under 3730(h) expired on March 7, 2000, three years after the effective date of her resignation. Wilson does not allege any facts which would support an argument that the statute should be tolled for any reason. Because Wilson did not file her Complaint until January 25, 2001, her cause of action for retaliatory discharge is time barred and is dismissed as to all Defendants.[3]

IV. ORDER

IT IS, THEREFORE, ORDERED that the Defendants' motions to dismiss the Plaintiff's first cause of action as a *qui tam* relator under the False Claims Act are hereby **DENIED** without prejudice to renewal after the filing of Plaintiff's Second Amended Complaint.

IT IS FURTHER ORDERED that the Plaintiff's motion to amend is **ALLOWED**, and the Court orders that any amendment relate back to the Complaint's original filing date. Plaintiff shall file her Second Amended Complaint within 20 days from entry of this Order.

IT IS FURTHER ORDERED that the Defendants' motions to dismiss Plaintiff's second cause of action for retaliatory discharge is hereby **ALLOWED**, and such claim is hereby **DISMISSED WITH PREJUDICE** as to all Defendants.

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[3] Further more, the Complaint on its face alleges that Wilson was employed by the Graham County District. As such, the cause of action under § 3730(h) would otherwise be dismissed against all Defendants other than the Graham County District.

THIS the 30th day of May, 2002.

/s/ Lacy H. Thornburg

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM OF OPINION AND CERTIFICATION OF APPEAL, DATED SEPTEMBER 19, 2002

UNITED STATES EX REL., KAREN T. WILSON,
Plaintiffs,

Vs.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; and EDDIE WOOD,
Defendants.

CIVIL NO. 2:01CV19

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, BRYSON CITY DIVISION

224 F. Supp. 2d 1042; 2002 U.S. Dist. LEXIS 17987
September 19, 2002, Decided

[*1045]MEMORANDUM OF OPINION AND CERTIFICATION FOR APPEAL

THIS MATTER is before the Court on the following: motion of Defendants Cherokee County Soil & Water Conservation District (the Cherokee County District), Bill Tipton, Eddie Wood, and C.B. Newton to dismiss, filed July

MEMORANDUM OF OPINION AND CERTIFICATION OF APPEAL, DATED SEPTEMBER 19, 2002

12, 2002; the motion of Defendants Graham County Soil & Water Conservation District (the Graham County District), Gerald Phillips, Allen Dehart, and Lloyd Millsaps to dismiss, filed July 12, 2002; Defendant Jimmie Orr's [*1046] motion to dismiss, filed July 12, 2002; the motion of Defendants Graham County, Raymond Williams, Dale Wiggins, and Lynn Cody to dismiss, filed July 12, 2002; and Relator Karen Wilson's motion for reconsideration of the Court's dismissal of the retaliation claim or, in the alternative, for certification of the Memorandum and Order filed May 30, 2002, pursuant to 28 U.S.C. § 1292(b), [**4] filed July 31, 2002. Responses have been filed and the motions are ready for resolution.

I. PROCEDURAL HISTORY

On January 25, 2001, Relator Karen Wilson brought a *qui tam* action against Defendants alleging violations of the False Claims Act (FCA), 31 U.S.C. § § 3729, *et seq.* n1 She further alleged that when she attempted to bring these false claims to light, her supervisor and co-workers retaliated against her, resulting in her constructive discharge in violation of § 3730(h) of the FCA. In the Memorandum and Opinion filed May 30, 2002, the Court denied the motions to dismiss based on municipal immunity as to all Defendants and granted the Relator's motion to amend her complaint. Further, the Court granted the Defendants' motions to dismiss the second cause of action for retaliatory discharge and dismissed the claim with prejudice as to all Defendants. On June 19, 2002, the Relator filed her Second Amended Complaint again alleging violations of the False

Claims Act, 31 U.S.C. § § 3729, *et seq*. Defendants then filed their respective motions to dismiss.

> n1 A *qui tam* action is authorized by the False Claims Act which provides that any person may bring a civil suit for a violation of the Act "for the person and for the United States Government. The action shall be brought in the name of the Government." 31 U.S.C. § 3730(b)(1). [**5]

II. DISCUSSION

A. The Rule 9(b) Motions.

Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, and Millsaps have filed motions to dismiss based on Fed. R. Civ. P. 9(b). The Rule states that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of the mind of a person may be averred generally." Fed. R. Civ. P. 9(b). A complaint in a *qui tam* action under the FCA must comply with the requirements of Rule 9(b). *See, United States ex rel. Detrick v. Daniel F. Young, Inc.*, 909 F. Supp. 1010, 1018 n.26 (E.D. Va. 1995) (noting that the applicability of Rule 9(b) to *qui tam* actions is well established); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1055, 1058 (S.D. Ga. 1990) (clarifying Congress' intent to continue to apply Rule 9(b) to FCA actions after the 1986 FCA amendments); *see also, United State ex rel. Robinson v. Northrop Corp.*, 149 F.R.D.

142, 144 (N.D. Ill. 1993). To satisfy Rule [**6] 9(b), a complaint must plead with particularity the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (citations omitted). Other courts have described the requirements as the "who, what, when, where, and how" of the alleged fraud. *United States ex rel. Walsh v. Eastman Kodak Co.*, 98 F. Supp. 2d 141, 147 (D. Mass. 2000).

Rule 9(b) ensures that defendants have sufficient knowledge of the claims against them in order to prepare an appropriate defense, it protects defendants from [*1047] frivolous suits, it eliminates fraud suits where all of the factual information is learned through discovery, and it protects defendants from injury to their reputation. *See, Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. at 1056-57.

A court, however, should be reluctant to dismiss an action pursuant to Rule 9(b) if the court is satisfied that "(1) the defendant has been made aware of the particular circumstances for which she will [**7] have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Harrison, supra.* Additionally, Rule 9(b) must be applied together with Fed. R. Civ. P. 8(a), which requires a "short and plain statement of the claim." The Relator, therefore, is required to plead the circumstances of the fraud, but is not required to present all of the evidence or facts supporting the allegations. *See United States ex rel. Franklin v. Parke-Davis, Div. of*

Warner-Lambert Co., 147 F. Supp. 2d 39, 46-47 (D. Mass. 2001) (citing 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1298 at 625-26 (2d ed. 1990). When the facts underlying the fraud are within the control of the defendant, for example, the Relator may be permitted under Rule 9(b) to plead the circumstances of the fraud with less precision. *See Boston & Maine Corp. v. Town of Hampton*, 987 F.2d 855, 866 (1st Cir. 1993); *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3rd Cir. 1989). In this case, the Court finds the Relator has satisfied the Rule 9(b) pleading requirements as to [**8] all relevant Defendants.

1. Federal Emergency Watershed Protection Program.

In her complaint, the Relator describes several instances of alleged fraud under the Emergency Watershed Protection Program for Graham, Cherokee and Clay Counties (hereinafter, EWP-216). The alleged false claims under EWP-216 involve Defendants Graham County Board, Graham County, Williams, Cherokee County Board, Cherokee County. Relator contends that these Defendants knowingly issued and approved improper payments for work that was not performed, not approved of, or performed improperly or secretly. These allegations meet the requirements of Rule 9(b) in terms of time, place, and contents of the false representation, as well as the identity and advantage gained by the perpetrator. As for the time requirement, Relator has presented a sufficiently narrow time period during which the alleged misrepresentations

took place. She has given specific dates on which requests for payments were made and checks were issued. Relator sufficiently addressed the place requirement by detailing the specific meetings and offices in which the allegedly false claims were made. Further, Relator adequately describes the contents [**9] of the false representations. She specifically addresses claims that were made for work not performed, improper claims that were approved, and secret and unapproved work that was performed in order to make fraudulent claims for payment. She then identifies, by name, each Defendant involved in the EWP-216 fraud and explains his role.

The Relator is not as specific in explaining what benefit each Defendant gained by committing fraud. She describes the motive as "to curry political and personal favor from the individual recipients of the ill-gotten funds and their family, friends and associates and thereby did obtain and enjoy such personal and political gain." Second Amended Complaint, filed June 19, 2002, P 31(o). While the allegation is made in general terms, it is sufficient to defeat a motion to dismiss. As Relator properly pled, both the motive and benefit gained are the type of information [*1048] that is in the exclusive control of each Defendant. Under these circumstances, the Relator is not required to plead these allegations any more specifically. *See Boston & Maine Corp., supra.* The Relator's complaint regarding EWP-216, therefore, is pled with sufficiently [**10] specific allegations and meets the requirements for Rule 9(b). The Defendants' motions to dismiss are therefore denied.

2. Farm Services Agency Program

In her complaint, Relator describes false claims made under the Farm Services Agency Programs (hereinafter, FSA); Defendants Graham County, the Graham County Board and Phillips have moved to dismiss these claims. These allegations also meet the requirements of Rule 9(b) in terms of time, place, and contents of the false representation, as well as the identity and advantage gained by the perpetrator. Relator meets the time requirement, by specifying the month and year of each false claim. She then adequately fulfills the place requirement by specifying the county and office in which the events occurred. Relator then explains the contents of the false representations by describing a Trout Waste Storage Structure and a Waste Storage Structure that were paid for with government funds. These structures were built and payment was approved despite the allegations that the projects did not meet the prerequisites for the funding. Finally, Relator alleges that the relevant Defendants received "personal and political gain" as a result [**11] of the false claims. This statement is sufficient for Rule 9(b) purposes. It gives Defendants proper notice of the alleged facts of the case and allows them to begin to prepare a defense. *See Harrison,* 176 F.3d at 784. The Second Amended Complaint, therefore, satisfies Rule 9(b) with respect to the FSA false claims and these Defendants, and the motions are denied.

3. Other False Claims Act Violations

Relator makes further, general allegations of violations of the FCA in her complaint. See, Second Amended

Complaint, Sections C and D, PP 39-69. These allegations are too general in nature to satisfy Rule 9(b). Relator fails to state the FCA claims to any degree of particularity. She does not indicate the time, place or content of any false claims. Further, it is unclear from these sections of the complaint what precisely the false claims are. Because of Relator's failure to specify her allegations in these sections of the complaint, any claims contained in Sections C and D of the complaint are dismissed.

B. Rule 12(b)(6) Motions

Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, Millsaps, Graham County, [**12] Williams, Wiggins and Cody have filed motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

The purpose of a Rule 12(b)(6) motion is to test the adequacy of a complaint. It does not resolve arguments regarding the facts, merits of the claims or the possible defenses. *See Republican Party of N.C. v. Martin,* 980 F.2d 943, 952 (4th Cir. 1992). When deciding a motion to dismiss for failure to state a claim, the Court must "accept the factual allegations in the plaintiff's complaint and must construe those facts in the light most favorable to the plaintiff . . . [Dismissal is appropriate] only if it appears beyond doubt that the plaintiff[] can prove no set of facts in support of [her] claim that would entitle [her] to relief." *Flood v. New Hanover County,* 125 F.3d 249, 251 (4th Cir. 1997). "To survive a motion under Fed. R. Civ. P. 12(b)(6), a complaint need only outline a recognized legal or

equitable claim which sufficiently pinpoints the time, place, and circumstances of the alleged occurrence [*1049] and which, if proven, will justify some form of relief." Shepard's, *Motions in Federal Court,* § 5.123, [**13] at 366 (2d ed. 1991). If "relief could be granted under any set of facts that could be proved consistent with the allegations," the motion must be denied. *Hishon v. King & Spalding,* 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984).

The FCA provides:

Any person who:

> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; or
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . . is liable to the United States Government for a civil penalty.

31 U.S.C. § 3729(a). The test for liability under the FCA is "(1) whether there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material; and (4) that caused the government to pay out money or to forfeit moneys due." *Harrison,* 176 F.3d at 788. This test should be construed

broadly. The FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government ... The Court has consistently refused to accept a rigid, restrictive reading [of the Act]." *Id.* (quoting *United States v. Neifert-White Co.,* 390 U.S. 228, 233, 19 L. Ed. 2d 1061, 88 S. Ct. 959 (1968)).

1. EWP-216 and FSA Claims

Relator's EWP-216 and FSA allegations are sufficient to survive the 12(b)(6) motions. Relator outlines several instances involving false statements or claims that resulted in the improper payment of government money. Further, she alleges the appropriate scienter and addresses the issue of materiality. In construing the facts in the light most favorable to the Realtor, as the Court must do at this stage of litigation, she has successfully stated a claim against most of the Defendants. Specific Rule 12(b)(6) arguments that were made by individual Defendants are addressed below.

2. Injury in Fact

Defendants Graham County, Williams, Wiggins, and Cody argue that the Relator failed to state a claim because she did not establish an injury in fact suffered by the government and she did not show how these Defendants personally benefitted from the claims. First, injury in fact is not a required element for an FCA claim. *See*, 176 F.3d at 785 n.7 ("In fact, there is no requirement that the government have suffered damages as a result of the fraud."). Relator, therefore, was not required to show injury in fact in her complaint. Second, Relator alleges that these

Defendants did gain personal benefit from the false claims. They received "personal and political gain" from these acts. This wording is sufficient to survive a 12(b)(6) motion to dismiss and, therefore, the motions are denied.

3. Individual Capacity

Defendants Newton, Tipton and Wood argue that any claim against them in their individual capacity should be dismissed under Rule 12(b)(6). After careful consideration, the Court agrees. Individual liability under the FCA must be pled with specificity and cannot be based exclusively on inserting the words "individual capacity" into the complaint. See *Lizzi v.* [*1050] *Alexander,* 255 F.3d 128, 136-37 (4th Cir. 2001), *cert. denied*, 534 U.S. 1081, 151 L. Ed. 2d 697, 122 S. Ct. 812 (2002) (citing *Bender v. Williamsport Area Sch. Dist.,* 475 U.S. 534, 543, 89 L. Ed. 2d 501, 106 S. Ct. 1326 (1986)). [**16] Any specific claim of individual liability must meet the requirements of Rule 12(b)(6).

Here, Relator Wilson has failed completely to allege that Defendants Newton, Tipton, and Wood, as individuals, did anything in violation of the FCA. Their names are not included in any part of the factual allegations of the complaint. The mere incantation of the term "individual capacity" is not sufficient to state a claim against these individuals. *See,* 255 F.3d at 137. The claims against these Defendants in their individual capacities, therefore, are dismissed pursuant to Rule 12(b)(6). However, the Realtor's claims against these Defendants in their official capacities remain.

4. Conspiracy Claim

Defendant Phillips moves to dismiss the conspiracy claim made against him pursuant to Rule 12(b)(6). Section 3729(a)(3) of the FCA provides that liability shall attach to any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." 31 U.S.C. § 3729(a)(3). General civil conspiracy principles apply to conspiracy claims under the FCA. *See, United States ex rel. Durcholz v. FKW, Inc.,* 189 F.3d 542, 546 n.3 (7th Cir. 1999). [**17] "The essence of a conspiracy under the Act is an agreement between two or more persons to commit a fraud." *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.,* 721 F. Supp. 1247, 1259 (S.D. Fla. 1989) (citing *Blusal Meats Inc. v. United States,* 638 F. Supp. 824, 828 (S.D.N.Y. 1986)). To allege civil conspiracy, the Relator must plead that the Defendants made an agreement to commit an illegal act, resulting in the Relator's injury. Specifically, the Relator must show: "(1) that the defendant conspired with one or more persons to get a false or fraudulent claim allowed or paid by the United States; [and] (2) that one or more conspirators performed any act to effect the object of the conspiracy." See, *United States, ex rel. Wilkins v. North American Constr. Corp.,* 173 F. Supp. 2d 601, 639-40 n.33 (S.D. Tex. 2001) (citations omitted); *see also, Thomas v. City of New Orleans,* 687 F.2d 80, 83 (5th Cir. 1982) (citations omitted). The Relator is not required to show specific damages from the injury. See, *Harrison,* 176 F.3d at 785 n.7. [**18]

In her complaint, Relator Wilson alleges that Defendant Phillips conspired with other members of the Graham County Board to discuss payment of Keith Orr's false claims. Relator identifies one meeting held in furtherance of this conspiracy. She also identifies one payment to Keith Orr that could have been the result of this meeting. Taking these allegations as true, as the Court must do at this point, Relator has sufficiently stated a claim of conspiracy under Rule 12(b)(6). Defendant's motion to dismiss is therefore denied.

C. Relator's Motion for Reconsideration of Retaliation Claim Ruling or, in the Alternative, Motion for 28 U.S.C. § 1292(b) Certification of Order

Relator Wilson has moved for the Court to reconsider its earlier ruling dismissing her retaliation claim as time-barred in light of a new decision from the Eastern District of Virginia. *See, Storey v. Patient First Corp.*, 207 F. Supp. 2d 431 (E.D. Va. 2002). After careful consideration, this Court declines to adopt that Court's ruling. Applying the standard outlined in *Lujan,* the applicable statute of [*1051] limitations in an FCA retaliation claim is taken from the [**19] most analogous state statute. *See, United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). North Carolina's statute of limitations for wrongful discharge is three years from the date of discharge. *Renegar v. R. J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 79, 549 S.E.2d 227, 229, review denied, 354 N.C. 220, 554 S.E.2d 344 (2001). This statute of limitations will apply to

retaliation claims under § 3730(h) of the FCA. Because she filed her retaliation claim more than three years after her discharge, Relator's retaliation claim is time-barred.

The Court, however, finds that this issue is proper for an immediate appeal and certification under 28 U.S.C. § 1292(b). In order to grant certification under § 1292(b), a district court must find that the order at issue "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1291(b). "[A] question is controlling if its incorrect [**20] disposition would require reversal of a final judgment for further proceedings." *State ex rel. Howes v. W. R. Peele, Sr. Trust,* 889 F. Supp. 849, 852 (E.D.N.C. 1995). The decision of whether to certify an order for interlocutory appeal is within the discretion of the district court. See, *Young v. Sheetz, Inc.*, 998 F. Supp. 670, 673 (W.D. Va. 1998).

Here, the controlling question of law is the proper statute of limitations for a retaliatory discharge claim under the FCA. There is a difference of opinions among circuit courts. *See, Lujan,* 162 F.3d at 1035 (9th Circuit holding that the statute of limitations for retaliatory discharge claims under the FCA is the same as the most analogous state statute); *Neal v. Honeywell, Inc.*, 33 F.3d 860, 866 (7th Cir. 1994) (holding that the statute of limitations for all FCA claims, including retaliatory discharge, is six years). If the proper statute of limitations is taken from the most analogous state statute, then it would be three years under a

North Carolina wrongful discharge claim and the Relator's claim is time-barred. If the proper statute of limitations [**21] is six years, then the Relator's claim is timely. Resolving this issue at this point in the litigation will potentially prevent duplicative litigation at a later date. Pursuant to § 1292(b), the Court is of the opinion that the ruling dismissing the Relator's retaliatory discharge claim as time-barred involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The motion for certification for appeal on the issue of the proper statute of limitations for the retaliatory discharge claim under the FCA is therefore granted.

D. Motion to Dismiss by Defendant Jimmie Orr

On July 12, 2002, the Defendant Jimmie Orr filed a motion to dismiss under Rule 12(b)(6) for failure to state a claim. He is not named as a Defendant in the Relator's Second Amended Complaint; the Relator eliminated Defendant Orr from this action when she amended her complaint and did not make any allegations against him. "A plaintiff wishing to eliminate particular claims or issues from the action should amend the complaint under Rule 15(a)." Moore's [**22] *Federal Practice 3d,* § 41.21[2] (citing *Skinner v. First Am. Bank of Virginia,* 64 F.3d 659 (table), 1995 WL 507264 (4th Cir. 1995)). Because Jimmie Orr is no longer a party to this action, he lacks standing to seek dismissal and his motion to dismiss is denied as moot.

[*1052] III. ORDER

IT IS, THEREFORE, ORDERED that the motions to dismiss filed July 12, 2002, by Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, and Millsaps pursuant to Fed. R. Civ. P. 9(b) are hereby DENIED as to the Relator's claims pertaining to the Federal Emergency Watershed Protection Program and the Farm Services Program; the motions are ALLOWED as to the Relator's remaining claims contained in Sections C and D of the Second Amended Complaint and such claims are hereby DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the motions to dismiss filed July 12, 2002, by Defendants Cherokee District, Tipton, Wood, Newton, Graham District, Phillips, Dehart, Millsaps, Graham County, Williams, Wiggins and Lynn Cody pursuant to Fed. R. Civ. P. 12(b)(6) are hereby DENIED, except that the motion of Newton, Tipton and Wood to dismiss [**23] Relator's claims against them in their individual capacities is ALLOWED, and such claims are hereby DISMISSED WITH PREJUDICE. The Relator's claims against these individual Defendants in their official capacities remain.

IT IS FURTHER ORDERED that the separate motion to dismiss filed by Jimmie Orr pursuant to Fed. R. Civ. P. 12(b)(6) is hereby DENIED as moot as he is no longer a party to this action.

IT IS FURTHER ORDERED that the Relator's motion for reconsideration of the dismissal of her claim for retaliation is hereby DENIED. Alternatively,

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

IT IS FURTHER ORDERED that the Relator's motion for certification of the Memorandum and Order of May 30, 2002, pursuant to 28 U.S.C. § 1292(b) is hereby ALLOWED, and the issue of the proper statute of limitations for a retaliatory discharge claim under the False Claims Act, 31 U.S.C. § § 3729, *et seq.*, is hereby certified for interlocutory appeal.

THIS the 19th day of September, 2002.

LACY H. THORNBURG
UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

UNITED STATES EX REL. KAREN T. WILSON,

Plaintiffs,

Vs.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; RICHARD GREENE; CHERIE GREENE; WILLIAM TIMPSON; RICKY STILES; KEITH ORR; BETTY JEAN ORR; RAYMOND WILLIAMS; DALE WIGGINS; JOYCE LANE; GERALD PHILLIPS; ALLEN DEHART; JIMMY ORR; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; EUGENE MORROW; CHARLES LANE; CHARLES LANEY; GEORGE POSTELL; BILL TIPTON; LLOYD KISSLEBURG; C. B. NEWTON; EDDIE WOOD; TED ORR; BERNICE ORR; JOHN DOE; JOHN DOE CORPORATIONS; and GOVERNMENTAL ENTITLES 1-99,

Defendants.

2:01cv19-T

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, BRYSON CITY DIVISION

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

March 26, 2002, Decided

THIS MATTER is before the court upon the following motions: (1) the motion to dismiss of defendants Graham County Board of County Commissioners, Raymond Williams, Dale Wiggins, and Lynn Cody (#31); (2) the motion to dismiss and for more definite statement of defendants Cherokee County Soil & Water Conservation District, Bill Tipton, Eddie Wood, and C. B. Newton (# 61); (3) the motion to dismiss of defendants Cherokee County Board of County Commissioners, Charles Laney, Eugene Morrow, and George Postell (# 62); (4) Relator's Motion for Leave to Amend Her Complaint (# 75); and (5) motion to dismiss of defendants Graham County Soil & Water Conservation District, Gerald Phillips, Allen DeHart, Jimmy Orr, and Lloyd Millsaps (#77). In addition to the memoranda submitted, oral arguments were presented at a hearing on February 20, 2002.

The primary issue presented is whether the False Claims Act ("FCA"), which provides for mandatory punitive damages, extends to municipalities that enjoy common-law governmental immunity from punitive damages. Other issues have also been presented, including whether some of the individual defendants sued in their individual capacities should be dismissed, whether relator should be allowed to amend her complaint to name the real parties in interest, n1 and whether relator has complied with the requirements of Rule 9(b), Federal Rules of Civil Procedure. In addition, an

MEMORANDUM AND RECOMMENDATION, DATED MARCH 25, 2002

issue has arisen as to whether the claims of the relator were filed within the period of limitations. n2

n1 The undersigned does not reach this issue because it appears that the named defendants enjoy municipal immunity. If the district court finds the need to reach such issue on review, it would be the recommendation of the undersigned that such amendment be allowed, inasmuch as the counties are the real parties in interest, they are the only governmental parties capable of being sued under prevailing law, and they had actual knowledge of the suit when the improperly named defendants were served. The undersigned simply would not concur in defendants' response to relator's motion to amend because prevailing case law would not support so strongly penalizing a procedural misstep. *See Ward Electronics Service, Inc. v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987).

n2 Defendants point to a shorter, state-law based period of limitation. Relator, however, cites a substantially longer period, which involves the FCA and reporting the fraud to the Attorney General of the United States. Because it is unclear when the Attorney General was made aware of these claims, this court is not in the position to determine

whether this action was brought within the period allowed. If this case survives the present motions, that issue may be revisited at an appropriate time.

I. Background

A. Nature of the Action

This action arises under the False Claims Act--31, United States Code, Sections 3729, *et seq.* n3 The relator is a former employee of defendant Graham County Soil & Water Conservation District. n4 She alleges that defendants conspired and participated in various schemes to defraud the United States by presenting false claims for payments under federal financial-aid programs intended to aid farmers and other landowners.

n3 Section 3729 provides, as follows:

(a) Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; . . .

is liable to the United States Government for a civil penalty of not less than $ 5,000 and not more than $ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

n4 The undersigned notes that it is undisputed that relator was an employee of this defendant, not the other municipal defendants, and that any retaliation claim could only be asserted against her "employer." As discussed *infra*, relator's general allegations and lumping parties together has caused a great deal of confusion in this matter, as evidenced by the 84 docket entries already made in this matter before issues have joined.

B. Summary of the Factual Allegations

The following summary is not intended to be all inclusive or binding, but to aid further review by giving the motions context. Relator's allegations of false claims, in part, stem from a federal disaster-relief program, "EWP-216," which was instituted through the Emergency Watershed Protection Program to assist with damage to streams and creeks caused by a storm in February 1995. According to the

allegations of the complaint, the following wrongful conduct occurred under the EWP-216 program: (1) inspectors under the program were paid for work that was not done and for work which was not properly bid, and they conspired [*7] with land owners to submit false claims; (2) conservation district supervisors conspired with the inspectors to approve those requests; (3) inspectors conspired with supervisors and others to privately sell and split the proceeds of timber that was removed as part of the federal program; and (4) the county commissions knowingly submitted false claims to federal authorities for payment.

Relator also contends that false claims were submitted and conspired to by many of the same defendants under the "North Carolina Agricultural Cost Share Program," which was federally funded. Relator alleges that certain defendants conspired with county conservation district employees or contractors to submit false claims for filter fabric and pipe--apparently, materials used to inhibit erosion and stream sedimentation--that was "sold" at inflated prices to landowners and/or never actually purchased or installed. According to relator, such conduct began in 1993 and ran through 1996.

Relator also contends that certain defendants submitted false claims under the Farm Services Agency Program. She claims that defendants engaged in self-dealing and approved projects which did not meet program guidelines. She has made additional claims concerning noncompliance with federal regulations and other alleged improprieties.

Realtor also alleges that she was harassed in her employment for bringing these matters to light. Such harassment, she claims, caused her certain medical problems and led to her constructive discharge in March 1997.

C. Relator's Causes of Action

In Count One, relator asserts a cause of action under the False Claims Act and seeks mandatory statutory treble damages, in addition to the statutory civil penalty for each violation, plus the relator's costs and attorneys' fees.

In Count Two, relator asserts a cause of action for a False Claims Act retaliation violation by her former employer, Graham County Soil & Water Conservation District, and the district supervisors, whom she contends were her "de facto" employers based on their domination of the district for their improper personal use.

II. Standard

Defendants have moved for dismissal pursuant to Rule 12(b), Federal Rules of Civil Procedure, contending that plaintiff has failed to state a cognizable claim. Rule 12(b) authorizes dismissal based upon a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 1832 (1989); [*9] *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41 (1957). As the Court discussed in *Neitzke*:

> This procedure [for dismissal], operating on the assumption that the factual allegations in the complaint are true, streamlines litigation by dispensing with needless discovery and fact finding. Nothing in Rule 12(b)(6)

> confines its sweep to claims of law which are obviously insupportable. On the contrary, if as a matter of law "it is clear that no relief could be granted under any set of facts . . . a claim must be dismissed, without regard to whether it is based on outlandish legal theory . . . . What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations."

Id., at 1832 (citation omitted). For the limited purpose of making recommendations as to disposition of defendants' motions, the undersigned has accepted as true the facts alleged by plaintiff in the complaint and has viewed them in a light most favorable to relator.

III. Motions to Dismiss Based on Common-Law Municipal Immunity

A. Overview

Although defendants have provided other grounds for dismissal, the central issue presented is whether the False Claims Act, which provides for mandatory punitive damages, was intended by Congress to extend to local governments, which enjoy common-law municipal or governmental immunity from punitive damages. Two circuits have held that the FCA does not extend to local governments; one circuit has held that it does. The undersigned, after much consideration, will, respectfully, follow the decisions of the circuits holding that the FCA does not extend to municipal governments.

B. Origin and Development of Municipal Immunity

Municipal immunity is the direct offspring of sovereign immunity. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, n.19 (1981). n5 Sovereign immunity begins with the notion that "the King can do no wrong," and that he could not be sued of right in his own courts. W. Prosser, The Law of Torts 125, at 996-97 (3d ed. 1964). *See Muskopf, supra*, n.1 ("Only out of sixteenth century metaphysical concepts of the nature of the state did the king's personal prerogative become the sovereign immunity of the state.")

> n5 For a differing view as to the origin as well as the continued need for municipal immunity, *see* Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 216 (1961).

Municipal immunity was first recognized at common law in *Russell v. Men of Devon*, 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788). In *Russell*, the plaintiff attempted to sue an unincorporated county for damages in tort, but the action was dismissed because the court found that "it is better that an individual should sustain an injury than that the public should suffer an inconvenience." 100 Eng. Rep., at 362. Such absolute immunity of municipal governing authorities, however, has gradually eroded in the last two centuries.

In explaining the important public policy concerns which continue to form the foundation of municipal immunity, the Supreme Court in *City of Newport*, *supra*, quoted the following language from a decision, which held that the city should not bear punitive damages for the malicious acts of its municipal officers:

> "Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case . . [*12] ., being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification."

Id., at 261 (citing *McGary v. President & Council of the City of Lafayette*, 12 Rob. 668, 674 (La. 1846)). The Court went on to hold that the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." *City of Newport*, *supra*, at n.21.

C. The Supreme Court Recognizes the Continued Vitality of Municipal Immunity

In *City of Newport*, plaintiff Fact Concerts, Inc., brought an action against the city when it unilaterally cancelled a rock concert based on fears that the crowd would be unruly. Plaintiff contended that the city had violated the protections afforded under 42, United States Code, Section 1983, by tortiously interfering with its first-amendment rights, and sought punitive damages. In finding that the city was

immune from punitive damages [*13] under Section 1983, the Court held, as follows:

> Punitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct.
>
> * * *
>
> In sum, we find that considerations of history and policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials. Because absolute immunity from such damages obtained at common law and was undisturbed by the 42d Congress, and because that immunity is compatible with both the purposes of 1983 and general purposes of public policy, we hold that a municipality is immune from punitive damages under 42 USC 1983.

Id., at 266-67 & 271.

D. Creation of the FCA in 1863 and Amendment in 1986

It is undisputed that the FCA was created in 1863 in response to widespread fraud by military contractors, not municipalities. n6 It is equally undisputed that between 1863 and 1986, the FCA, which occasionally was amended, remained virtually unchanged, providing for remedial "double damages." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999).

> n6 "The FCA was enacted in 1863 with the principal goal of 'stopping the massive frauds perpetrated by large [private] contractors during the Civil War.'" Stevens, infra, at 781.

In 1986, Congress amended the FCA by providing for treble damages. As relator argues, trebling damages was intended, as the Harrison court found, to unleash a "posse of ad hoc deputies to uncover and prosecute frauds against the government." *Id.,* at 783. The 1986 amendment, however, did not meaningfully alter the definition of "persons" covered by the Act. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

E. The FCA After the 1986 Amendments

In Stevens, *supra*, the Supreme Court dismissed relator's FCA action based on the common-law presumption against imposition of punitive damages on governmental entities, but specifically declined to reach the issue of whether such an action would have been barred under the eleventh amendment.n7 The Court explained its decisional process, finding, as follows:

> We nonetheless have routinely addressed *before* the question whether the Eleventh Amendment forbids a particular statutory cause of action to be asserted against States, the question whether the statute itself *permits* the cause of action it creates to be asserted against States (which it can do only by clearly expressing such an intent).

Id., at 779. In determining whether a state was an appropriate target of an FCA action, the Stevens Court considered 31, United States Code, Section 3729(a), which subjects to liability

> [a]ny person . . . [who] knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval.

Id. The Court applied its presumption that "person" does not include the sovereign, *id.*, at 780, which it determined was not a "hard and fast rule of exclusion," *id.*, at 781 (internal quotation and citation omitted), but one which a court could disregard only "upon some affirmative showing of statutory intent to the contrary." *Id.* The Court went on to hold that the liability provision of the FCA, as enacted in 1863,

> bore no indication that States were subject to its penalties. Indeed, far from indicating that *States* were covered, it did not even make clear that *private corporations* were, since it applied only to "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States," and imposed criminal penalties that included imprisonment. [FN11] Act of Mar. 2, 1863, ch. 67, § 3, 12 Stat. 698. We do not suggest that these features directed only at natural persons cast doubt upon the courts' assumption that § 3729(a) extends to corporations, see, *e.g.*, *United States ex rel.*

> *Woodard v. Country View Care Center, Inc.*, 797 F.2d 888, 890 (C.A.10 1986)--but that is because the presumption with regard to corporations is just the opposite of the one governing here: they are presumptively *covered* by the term "person," see 1 U.S.C. § 1. But the text of the original statute does less than nothing to overcome the presumption that States are *not* covered.

Id. at 782. The Court further held that the denotation of "persons" who could be subject to liability under the Act was contained in Section 3729, and nowhere else in the FCA--a section which "has remained in the statute unchanged since 1863." 529 U.S. at 783. The definition of person, as referenced by the *Stevens* Court, provides, as follows:

> [T]he words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals . . .

Id.

> n7 "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., Amend. XI.

Finally, the *Stevens* Court unequivocally found that "the current version of the FCA imposes damages that are essentially punitive in nature, which would be inconsistent

with state [*18] *qui tam* liability in light of the presumption against imposition of punitive damages on governmental entities." *Id.*, at 784-85.

F. Split Among the Circuits

As has been well-briefed by the parties, there exists a split among the circuits that have considered the question of whether municipalities are subject to the FCA. The undersigned will briefly discuss each of the three decisions.

1. Seventh Circuit Finds No Municipal Immunity

In *United States ex rel. Chandler v. Hekotoen Inst. for Med. Research*, F.3d , 2002 U.S. App. LEXIS 847 (7th Cir. January 22, 2002), the Court of Appeals for the Seventh Circuit found that a county did not enjoy the protection of municipal immunity from the FCA. Specifically, the *Chandler* court held that Congress had made no *exception* in the FCA that would exempt municipalities. *Id.*, 2002 U.S. App. LEXIS at 11. In distinguishing its decision from that of the Supreme Court in *Stevens*, *supra*, which found as a significant factor in favor of immunity the inclusion of states in the Section 3733 definition of those subject to investigative demands but not included in the definition of persons liable under the Act, the court in *Chandler* held that a similar inclusion/exclusion of municipal governments gave rise to the opposite inference, *i.e.*, that Congress did intend to subject municipalities to FCA liability, because municipalities have traditionally been included in the definition of "persons" and do not enjoy the same "privilege of place within our constitutional structure" that states enjoy. *Id.*, at n.7.

To summarize, the *Chandler* court found that Congress intended to include municipalities in the FCA, because they have long been considered legal "persons"; a municipality, therefore, is included in the definitional section of the FCA; and Congress has made no exception in the FCA that would exclude municipalities from liability under the Act.

2. Fifth Circuit Finds Municipal Immunity

In *United States ex rel. Garibaldi v. Orleans Parish School Board*, 244 F.3d 486 (5th Cir. 2001), the Court of Appeals for the Fifth Circuit concluded that a municipality was not a "person" subject to liability under the FCA. Although predating *Chandler* and ultimately coming to an opposite conclusion, the court in *Garibaldi* made a number of conclusions of law that were similar to those in *Chandler*: the Supreme Court's decision in *Stevens* (*i.e.*, that a state is not amenable to suit under the Act) is not "particularly instructive," except in its finding that the FCA is punitive; local governments do not enjoy the same sovereign status as states; and in federal jurisprudence, a municipality traditionally is included in the definition of "persons." *Id.*, at 491.

The *Garibaldi* court went on to hold that the Supreme Court made clear that "imposing punitive damages on local governments is ordinarily contrary to sound public policy," *id.*, at 491, *citing City of Newport*, *supra*, at 263, and reasoned that "punishing a local government is pointless," because the punishment "in the form of higher taxes or reduced public services, is visited upon the blameless." *Id.* In

a vein similar to the Supreme Court in *City of Newport*, n8 the *Garibaldi* court likewise held, as follows:

> Though Congress is free to make that determination [that local governments are subject to treble damages under the FCA] if it chooses, we will not find such a choice absent clear language in the text of the False Claims Act.

Id., at 492.

> n8 The Supreme Court held in *City of Newport* that the "general rule today is that no punitive damages are allowed unless expressly authorized by statute." *City of Newport*, *supra*, at n.21.

While conceding that the term "persons," as traditionally used in federal jurisprudence, would include municipalities, and that municipalities would arguably be included in the residual definition of "persons" contained in the so-called Dictionary Act-- 1, United States Code, Section 1--the *Garibaldi* court went on to hold that by amending the FCA to provide for mandatory punitive damages, "the context indicates" that Congress intended "local governments not be subject to liability under the False Claims Act." *Id.*, at 492.

> We are convinced that the punitive damages regime of the False Claims Act discussed above reflects a congressional intent that the term "person" in the liability provisions [*22] of the False Claims Act not include local governments.

Id., at 493.

The *Garibaldi* court also addressed the argument of the relator and the government that no municipal immunity should apply in the FCA, because the Supreme Court had earlier found that local governments were subject to punitive damage awards in other federal statutes, including civil rights and antitrust provisions. The court distinguished the leading case on the application of civil rights laws to municipalities, *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978), finding that *Monell* was based on the legislative history of the Act, which clearly indicated that Congress intended to target those acting "under color of state law," especially local governments, which were taking private property without just compensation. *Garibaldi*, *supra*, at 493-94.

As to the application of antitrust laws to municipalities, the *Garibaldi* court held that the Supreme Court's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), was distinguishable because that Court had found the language of the Act to be "'comprehensive'" and a "'carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.'" *Garibaldi*, *supra*, at 494 (*quoting City of Lafayette*, *supra*, at 399). The *Garibaldi* court concluded that the Supreme Court had not extended municipal immunity, because the antitrust laws establish a "fundamental and all-encompassing regulatory regime for commercial activity," which would be equally applicable to municipalities that "go out into the marketplace and engage in this type of activity." *Id.*, at 494.

Relying upon *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, *supra*, which found that the FCA did not reach states, the *Garibaldi* court concluded that the FCA was not intended to be as far reaching as the antitrust laws.

To summarize *Garibaldi*, the Court of Appeals for the Fifth Circuit held that the punitive damages provision of the FCA shows a congressional intent that the FCA is inapplicable to municipal governments, because there is "no contrary expression of legislative intent" and no inapposite purpose "behind the False Claims Act" n9 that would advise otherwise.

n9 *Accord* United States ex rel. Long v. SCS Business & Technical Inst., Inc., 173 F.3d 870, 875 (D.C. Cir. 1999), *cert. denied*, 530 U.S. 1202 (2000).

3. Third Circuit Finds Municipal Immunity

In the latest decision on point, the Court of Appeals for the Third Circuit in *United States ex rel. Dunleavy v. County of Delaware*, 279 F.3d 219, 2002 W.L. 111365 (3d Cir. January 29, 2002), found that the county defendant was not subject to suit under the FCA due to the Act's mandatory punitive damages provisions. As did the Supreme Court in *City of Newport*, *supra*, and the Court of Appeals for the Fifth Circuit in *Garibaldi*, the *Dunleavy* court found that local governments enjoyed immunity from punitive damages unless "Congress clearly provides otherwise . . . ." *Id.*, at 222. The court further held that to overcome common-law

immunity from punitive damage awards, Congress must "expressly abrogate" such immunity in the statute. *Id.*

The court went on to hold that the government's and relator's statement of the issue, *i.e.*, whether a municipality is a "person" under the Act, was just the "other side of the coin with the question before us," *id.*, which was whether Congress had "clearly abrogated local governmental immunity under the FCA." *Id.* The court first pointed to other examples where Congress had specifically defined the term "persons" to include municipalities, then turned to the FCA, as originally enacted in 1863 and in its present form, and found that the Act "is utterly devoid of any specific intention to subject local governments to its strictures." *Id.* The court held, as follows:

> [L]ack of clarity in the text of the Act is insufficient indicia of congressional intent to abrogate local governmental immunity from punitive damages under the FCA.

Id.

An argument was presented in Dunleavy, which has also been presented here, that by enacting treble damages in 1986, Congress evidenced its intent to subject local governments to punitive damages. The court held that by enacting the treble damages provision, Congress did not express a clear intent to add anything to the meaning of person, and that such appellate court had previously determined that adding punitive damages to civil RICO manifested congressional "intent to *exclude* local governments from . . . coverage." *Id.* (emphasis in original).

As in *Garibaldi*, the *Dunleavy* court concluded that "imposition of treble damages is powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA." Id. Finally, the *Dunleavy* court found the *amicus* argument--that the intent of Congress could be discerned through the legislative history of the 1986 amendments--was without merit, inasmuch as the *Stevens* Court had already found such material "erroneous and of questionable value." *Id.* (citation omitted).

In summary, the *Dunleavy* court found that the FCA was punitive, and that in order to set aside common-law municipal immunity, Congress must clearly express its intent to abrogate such protection. Further, that court found that Congress had not clearly expressed such an intent in the FCA.

G. Discussion

The undersigned has considered the well-reasoned briefs of the parties, as well as the *amicus curie*, and appreciates the fine manner in which this issue has been presented. Each side has submitted persuasive arguments, and the court can see how either side could well carry its argument through the appellate process. For the reasons discussed below, however, the undersigned must respectfully recommend that defendants' motions to dismiss be allowed, inasmuch as municipal immunity has not been clearly waived by Congress in the False Claims Act. The discussion will first consider whether the FCA is punitive; second, whether a municipality is a "person" under the FCA; and finally,

whether Congress has abrogated common-law municipal immunity in the FCA.

1. Does the FCA Provide for Punitive Damages?

When the subject Act was created in 1863, Congress was not only at war and lacking revenue from more than a third of the formerly United States, it was also at economic war with its own suppliers of military ordnance. Enacted in the midst of civil war, the False Claims Act clearly was intended to stem the tide of fraud from dishonest private parties. *Stevens*, *supra*, at 781. For more than six-score years, the FCA remained virtually unchanged. *Harrison*, *supra*, at 783. In 1986, Congress gave the FCA teeth by providing substantial per-violation civil penalties, attorney fees, and treble damages. In addition to civil penalties, Congress split off the criminal penalties, making a false claim a five-year felony. *See* 18 U.S.C. § 287. As the Court of Appeals for the Fourth Circuit observed, the 1986 civil amendments were intended to unleash a "posse" of private whistle blowers. *Harrison*, *supra*, at 783.

The Supreme Court held in Stevens that the FCA's mandatory treble damages are "punitive in nature." *Id.*, at 784. The *amicus* conceded this point at oral arguments, and relator joined in such concession. The undersigned finds, as a matter of settled law, *id.*, that the mandatory damages provision of the FCA, which was created in the 1986 amendments, is punitive, while the prior scheme, which provided for double damages, was remedial. n10 Unlike many other state and federal provisions, imposition of

punitive damages under the FCA is mandatory, *i.e.*, a false claim must be punished with treble the actual damages.

n10 For the purpose of completeness, the undersigned notes that single or actual damages are compensatory.

2. Is a Municipality a Person Under the FCA?

Deciding whether a municipal government is a "person" under the present Act has caused a number of appellate courts to diverge and for logic to become fuzzy. As early as 1844, the Supreme Court recognized that towns, cities, and counties were something less than a full sovereign; they could breach contracts and commit torts; and they were more akin to a "person" than a king. *See Louisville R. Co. v. Letson*, 2 How. 497, 558, 11 L. Ed. 353 (1844) (commercial corporation is a citizen); *Cowles v. Mercer County*, 7 Wall. 118, 121, 19 L. Ed. 86 (1869) (reaffirming that a municipality is a citizen capable of being sued in federal court). Even before courts recognized that towns were "persons," they had recognized that they enjoyed common-law municipal immunity. *Mower v. Leicester*, 9 Mass. 247 (1812).

By 1863, when the FCA was enacted, it is clear that Congress knew (or should have known) that a municipality or a political body less than a sovereign state was a person. From 1863 through 1986, there is no doubt but that a municipality was a person, as contemplated by the FCA, which was at all relevant times thereto a remedial scheme. There are, however, no reported cases which this court can

find wherein a municipality challenged the pre-1986 FCA based on municipal immunity. n11

> n11 This may be so because pre-1986, damages were remedial and municipalities did not enjoy immunity from remedial damages, or, perhaps, no FCA actions had been filed against municipalities.

The undersigned agrees with the reasoning of the *Dunleavy* court that whether a municipality remains a person under the post-1986 Act is just the flip side of the issue of whether Congress intended to bring municipalities into federal court under the FCA. It is undisputed that the 1986 amendments left the definition of "persons" unscathed and that amendments prior to that date had made no substantive change since 1863. With the exception of a few growing pains, a municipality is no less a "person" today than it was in 1986, 1863, or 1844; however, the issue is not whether the attributes of personage have changed, but whether the statute has changed.

True, the Supreme Court has recognized that there is no municipal immunity from treble damages in civil-rights actions where a plaintiff can plead and prove the wrongful conduct was pursuant to municipal policy and in antitrust laws, even though no textual abrogation is found in either statute. In the civil-rights statutes, the Court found that they were conceived to circumvent municipal wrongdoing that struck at the heart of civil liberties, while in antitrust laws, Congress was so explicit in its draftsmanship as to leave no doubt that municipalities could run afoul of antitrust laws.

Assuming that a municipality is a "person" as, for all practical purposes, it has always been, the issue comes down to whether Congress intended to subject municipalities to treble damages under the FCA, which may be discerned from the language of the amended FCA, read as a whole.

3. Has Congress Abrogated Common-Law Immunity in the FCA?

As the Supreme Court has already held, the legislative history surrounding the 1986 amendments provides courts with little to no help. Stevens, supra. Instead, this court must step back and first consider the plain language of the Act.

Just as Congress in 1863 was charged with having known that the Supreme Court had recognized municipalities as persons when the FCA was enacted, so, too, must Congress in 1986 be charged with knowledge that the Supreme Court had clearly held in 1981 that in order to subject a town to punitive damages, Congress must clearly express its intent to abrogate common-law municipal immunity damages. *City of Newport*, *supra*, at n.21. While Congress clearly changed the scheme of the FCA from remedial to punitive in 1986, no change was made to the "persons" subject to the Act, and the only argument that can be championed is the same one that was relied upon by the Seventh Circuit--that Congress knew that municipalities were "persons," that Congress failed to exclude municipalities from coverage under the Act, and that a court can conclude therefrom that Congress intended to make municipalities liable for treble damages.

The problem with the Seventh Circuit decision in *Chandler* is that it relies upon the inverse of the Supreme

Court requirement for legislative abrogation of an immunity. While drawing reasonable inferences may be appropriate in usual instances of statutory construction, the Supreme Court has made it clear that courts will not infer congressional intent to abrogate common-law municipal immunity. The duty of Congress is to be explicit when it determines that municipalities should be subject to punitive damages. The decision of the Court of Appeals for Seventh Circuit, in finding that the FCA failed to expressly *exclude* municipalities after 1986, is inapposite to the requirement of *City of Newport* that Congress expressly *include* municipalities, because "no punitive damages are allowed unless expressly authorized by statute." *Id.*, at n.21. The undersigned does not believe that the Supreme Court would make the same exception to the general rule concerning municipal immunity that it did for civil-rights statutes and antitrust laws, inasmuch as the origin of the FCA was not civic corruption and the language of the FCA is not explicit.

This court has struggled with the implication that in dismissing this action, it may allow miscreants, at least in their official capacities, to go unpunished. As discussed below, although municipalities and officials sued in their official capacities may escape the FCA, it is not so clear that officials sued in their individual capacities are entitled to dismissal. Immunities have developed at common law, are a part of a system that must take into account equity, and courts seldom, if ever, *infer* legislative abrogation.

It is certainly within the power of Congress and other legislative bodies to legislate away immunities that have

been "legislated" by jurists through the common law; however, Congress must expressly and clearly state that the law reaches those who would otherwise enjoy an immunity. *City of Newport*, *supra*. While such a requirement may be viewed as judicial quibbling, it serves a valid purpose--to require Congress to provide the privilege holder with fair notice. Otherwise, common-law immunities will be dissolved at common law, resulting in exactly what has occurred here--differing and strained opinions of reasonable jurists making more common law and increasing uncertainty as to whether a common-law immunity can be relied upon.

The undersigned will recommend that the motions to dismiss of the municipal defendants, *eo nominee*, the counties, and defendants sued in their official capacities be granted. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985) (a suit against a government official, sued in his or her official capacity, is a suit against the governmental entity).

IV. Motions to Dismiss Individual Defendants Sued In Their Individual Capacities

Some of the individual defendants have moved for dismissal, contending that under the FCA, they cannot be sued unless it is alleged that they somehow personally gained from the alleged false claims. In addition, they argue that Rule 9(b), Federal Rules of Civil Procedure, requires more precise pleading, inasmuch as relator is alleging fraud, "which shall be stated with particularity." *Id.* Defendants also contend that the allegations are insufficient to support relator's claims of conspiracy.

Clearly, governmental officials can be sued in their individual capacities for allegedly corrupt acts done in their official capacities. *Hafer v. Melo*, 502 U.S. 21 (1991). While relator has cited cases outside this circuit in support of the proposition that Rule 9(b) should be applied in a more "relaxed" fashion, *see United States ex rel. Butler v. Magellan Health Services*, 74 F. Supp. 2d 1201, 1215 (M.D. Fla. 1999), the prevailing view within this circuit is that Rule 9(b) applies with equal force to claims brought under the FCA:

> Since Appellant in this case alleges fraud, his claim is subject to Federal Rule of Civil Procedure 9(b), which requires that claimants plead fraud with particularity. According to two noted scholars, the "circumstances" required to be pled with particularity under Rule 9(b) are "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Mere allegations of "fraud by hindsight" will not satisfy the requirements of Rule 9(b). The second sentence of Rule 9(b) allows conclusory allegations of defendant's knowledge as to the true facts and of defendant's intent to deceive.
>
> Rule 9(b) has four purposes: First, the rule ensures that the defendant has sufficient information to formulate a defense by putting it

> on notice of the conduct complained of. . . . Second, Rule 9(b) exists to protect defendants from frivolous suits. A third reason for the rule is to eliminate fraud actions in which all the facts are learned after discovery. Finally, Rule 9(b) protects defendants from harm to their goodwill and reputation.

Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 783-84 (4th Cir. 1999)(citations and footnote omitted).

The allegations of both fraud and conspiracy in the complaint are scattershot and do not contain allegations of the "time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." *Id.* If it is important enough to the relator to bring an action and subject a person to the enormous expense and burden of defending his or her actions, it is important enough that the relator make specific allegations as to each and every defendant and as to each and every contention of alleged wrongdoing. The undersigned finds, however, that the proposed dismissal is a harsh penalty for failure to comply with Rule 9(b) n12 and will recommend that the district court allow relator's Motion to Amend, but with provisos: that relator carefully reconsider the scope and breadth of her complaint, whether she has reason within the bounds of Rule 11 to bring each of these defendants into this forum, and whether she can provide sufficient allegations within the bounds of Rule 9(b). Finally, it would appear that there is some authority for the

proposition that for individual-capacity liability to attach under the FCA, some allegation of personal gain should be made. *United States. ex. Rel. Graber v. City of New York*, 8 F. Supp. 2d 343, 356 (S.D.N.Y. 1998); *United States ex rel. Honeywell, Inc. v. San Francisco Housing Authority*, 2001 U.S. Dist. LEXIS 9743, F. Supp. 2d , 2001 WL 793300 (N.D.Cal. 2001).

> n12 "A court should hesitate to dismiss a complaint under Rule 9(b) if the court is satisfied (1) that the defendant has been made aware of the particular circumstances for which she will have to prepare a defense at trial, and (2) that plaintiff has substantial prediscovery evidence of those facts." *Id.*

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that:

(1) defendants Graham County Board of County Commissioner's, Raymond Williams's, Dale Wiggins's, and Lynn Cody's motion to dismiss (#31) be **DENIED** in part and **GRANTED** in part, and that the Graham County Board of County Commissioners and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their

individual capacities, be **DENIED** without prejudice;

(2) defendants Cherokee County Soil & Water Conservation District's, Bill Tipton's, Eddie Wood's, and C. B. Newton's motion to dismiss and for more definite statement (#61) be **DENIED** in part and **GRANTED** in part, and that the Cherokee County Soil & Water Conservation District and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their individual capacities, be **DENIED** without prejudice;

(3) defendants Cherokee County Board of County Commissioner's, Charles Laney's, Eugene Morrow's, and George Postell's motion to dismiss (#62) be **DENIED** in part and **GRANTED** in part, and that the Cherokee County Board of County Commissioners and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their

individual capacities, be **DENIED** without prejudice;

(4) Relator's Motion for Leave to Amend Her Complaint (#75) be **ALLOWED** and that relator be granted leave to amend to comply with Rule 9(b); and

(5) defendants Graham County Soil & Water Conservation District's, Gerald Phillips's, Allen DeHart's, Jimmy Orr's, and Lloyd Millsaps's motion to dismiss (#77) be **DENIED** in part and **GRANTED** in part, and that the Graham County Soil & Water Conservation District and the individual defendants sued in their official capacities be **DISMISSED** based on common-law municipal immunity; but that the motion to dismiss, insofar as it seeks dismissal of claims against the individual defendants sued in their individual capacities, be **DENIED** without prejudice.

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within ten (10) days of service of same. Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. *Thomas v. Arn*, 474 U.S. 140 (1985), *reh'g denied*,

474 U.S. 1111 (1986); *United States v. Schronce*, 727 F.2d 91 (4th Cir.), *cert. denied*, 467 U.S. 1208 (1984).

This 25th day of MARCH, 2002.

MAX O. COGBURN, JR.
UNITED STATES MAGISTRATE JUDGE

FOURTH CIRCUIT RULING ON PETITION FOR REHEARING AND REHEARING EN BANC (DENIED), DATED JUNE 28, 2004

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
FILED
June 28, 2004
No. 03-1122
CA-01-19-2

UNITED STATES OF AMERICA ex rel. KAREN T. WILSON

Plaintiff – Appellant

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILL BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY

Defendants – Appellees,

and

GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS; CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS; CHERIE GREENE; RICKY STILES; BETTY JEAN ORR; JOYCE LANE; JIMMY ORR; EUGENE MORROW; CHARLES LANEY; GEORGE POSTELL; LLOYD KISSLEBURG; TED ORR;

FOURTH CIRCUIT RULING ON PETITION FOR REHEARING AND REHEARING EN BANC (DENIED), DATED JUNE 28, 2004

BERNICE ORR; JOHN DOE; JOHN DOE CORPORATIONS, and defendant; GOVERNMENT ENTITIES 1-99

Defendants.

On Petition for Rehearing and Rehearing En Banc

Appellees Cherokee County, Tipton, Newton, and Wood filed a petition for rehearing and rehearing en banc. Appellees Graham County, Phillips, Dehart, and Millsaps filed a petition for rehearing and rehearing en banc which joined in and incorporated by reference the petition filed by Cherokee et al.

Judge Wilkinson voted to grant panel rehearing. Judges Duncan and Michael voted to deny.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Duncan for the Court.

For the Court,
/s/ Patricia S. Connor
CLERK

28 U.S.C. § 3729 (2003) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3729. False claims

(a) Liability for certain acts.— Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without

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completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

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the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined.—For purposes of this section, the terms "knowing" and knowingly" mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) Claim defined.—For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure.—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt for disclosure under section 552 of title 5.

(e) Exclusion.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

31 U.S.C.S. § 3730 (2004) (FALSE CLAIMS ACT)

TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons.

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the

court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall--

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the

defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as--

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the

31 U.S.C.S. § 3730 (2004) (FALSE CLAIMS ACT)

Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

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(d) Award to qui tam plaintiff.

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and

shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred.

(1) No court shall have jurisdiction over an action brought by

a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on

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the information.

(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3731. False claims procedure

(a) A subpena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought--

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of

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Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3732. False claims jurisdiction

(a) Actions under section 3730. Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

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TITLE 31. MONEY AND FINANCE
SUBTITLE III. FINANCIAL MANAGEMENT
CHAPTER 37. CLAIMS
SUBCHAPTER III. CLAIMS AGAINST THE UNITED STATES GOVERNMENT

§ 3733. Civil investigative demands

(a) In general.

(1) Issuance and service. Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express

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demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines.

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall--

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall--

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall--

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which

is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information.

(1) In general. A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under--

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any

such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction.

(1) By whom served. Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would

have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons.

(1) Legal entities. Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by--

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. Service of any such demand or petition may be made upon any natural person by--

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed

to the person at the person's residence or principal office or place of business.

(e) Proof of service. A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material.

(1) Sworn certificates. The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by--

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in

such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by--

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations.

(1) Procedures. The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. The oral testimony of any person taken pursuant to a civil investigative demand

served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send

the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony.

(A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of

the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [18 USCS § § 6001 et seq.].

(8) Witness fees and allowances. Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts.

(1) Designation. The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure.

(A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of

information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe--

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return

to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and--

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil

investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly--

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings.

(1) Petition for enforcement. Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand.

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(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person

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filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery.

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed--

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the

petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure shall apply to any

petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definitions. For purposes of this section--

(1) the term "false claims law" means--

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

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(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes--

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

(2)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 04-169

IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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November 2004

QUESTION PRESENTED

Should the courts borrow a limitations period from state law for claims of retaliatory discharge under section 3730(h) of the False Claims Act, instead of following the express language of Section 3731 of the False Claims Act, which provides a six-year statute of limitations to all civil actions filed under section 3730, on the ground that Congress could not have intended its statute to be read literally given the theoretical possibility of anomalous results that have never presented themselves in a single reported case in the eighteen years since the cause of action and the limitations period were established?

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STATEMENT

A. Facts[1]

Beginning in January 1993, respondent Karen T. Wilson worked as a secretary for petitioner Graham County Soil and Water Conservation District. Her office became involved with the Emergency Watershed Protection Program, a federal disaster relief program responding to a storm in February, 1995, the North Carolina Agricultural Cost Share Program, a federally assisted program to aid local farmers, and Farm Services Agency programs for cropland improvement. In connection with her job, she learned of several ways in which local officials milked the program to obtain payments for work that had not been done, or to sell products to farmers while pocketing the proceeds, by filing false reports and forging the signatures of the landowners that were supposedly being benefitted. She also learned that local officials had made arrangements for their friends to receive payments for which they did not qualify by falsifying reports.

Wilson was ordered to issue payments despite their evident illegality. She reported these shenanigans to the proper authorities, first within her own agency and eventually to the federal government. She provided evidence to state and federal law enforcement investigators, and testified at the criminal trial of one participant, who was convicted on felony charges in 1999.

After her superiors learned that Wilson was blowing the whistle on them, they tried to get evidence of wrongdoing destroyed, and they tried to "kill the messenger" instead of rectifying the problem. The targets of her disclosures, and their

---

[1]The statement of facts is based on the complaint. Because the case was dismissed as untimely, no further factual development has occurred.

associates, began a campaign of harassment against Wilson and her family. A gun barrel was left on her desk and threats and obscene gestures, including threats of physical violence, were directed at Wilson and her family. Superiors gave her critical evaluations and threatened to close the office where she worked. Wilson's co-workers ostracized her. This treatment caused Wilson grave physical and emotional distress, which left her bedridden for a month. After she returned from a medical leave of absence, the harassment continued, and, eventually, in 1997, she was forced to resign.

B. Proceedings Below

On January 25, 2001, Wilson filed a sealed complaint in the United States District Court for the Western District of North Carolina. She proceeded under the False Claims Act ("FCA"), 31 U.S.C. § 3730, proceeding both as a qui tam relator under section 3730(b), seeking repayments to the United States, and on her own behalf under section 3730(h), seeking remedies for her harassment and constructive discharge. After the United States declined to intervene, the complaint was unsealed and petitioners moved to dismiss, arguing both that all of Wilson's claims were barred by the doctrine of municipal immunity, and that her retaliation claims were time barred because she had not sued within the three-year period allowed by the North Carolina statute of limitations for wrongful discharge. Petitioners also contended that Wilson's complaint did not allege fraud with sufficient specificity. Wilson responded that her claim was governed by the six-year limitations provided for section 3730 claims by 31 U.S.C. § 3731(b). In an opinion reported at 2002 WL 487162, the Magistrate Judge recommended granting the motion to dismiss on immunity and specificity grounds, but reserved the limitations issue because, he concluded, several relevant facts

were unavailable (Pet App. 91a n.2-92a).

Wilson filed timely objections to this report, but petitioners did not, waiving any objections to the Magistrate Judge's failure to reach the limitations issue. In an opinion reported at 2002 WL 31455718, the district judge reversed on the issue of municipal immunity, ruling in agreement with the Seventh Circuit that Congress clearly intended that the FCA would apply to municipalities. The judge agreed with petitioners, however, that Wilson had not alleged petitioners' fraud with sufficient specificity, and directed Wilson to amend her complaint. The judge also reached out, sua sponte, to decide the limitations issue and dismissed Wilson's retaliation claim on that ground. The court acknowledged that the language of the statute expressly extends the limitations period to all civil actions under section 3730, but found it anomalous to apply that limitations period to actions under section 3730(h) because the period begins to run when the underlying False Claims Act violation is committed, or at least when that violation is discovered. The court was concerned that applying such a statute of limitations to retaliatory discharges could produce anomalous results because, if no violation of the False Claims Act was ever committed, the statute would never have begun to run and therefore a claim for retaliation would be foreclosed by the limitations provision (Pet. App. 69a). Based on this reasoning, the district court assumed that Congress must not have intended the limitations period to be applied according to its terms, but rather must have intended to leave the issue of a limitations period to be resolved by borrowing the most analogous state period. *Id.* Because the most analogous state period was North Carolina's three year period for wrongful discharges, the court decided to borrow that period, under which Wilson's claim would be time-barred.

Wilson amended her complaint as directed, but also moved in the alternative for reconsideration of the limitations

ruling, pointing out that a different district court in the Fourth Circuit had applied the express limitations period in a carefully reasoned decision. *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431 (E.D. Va. 2002). In an opinion reported at 224 F. Supp. 2d 1042, the district judge upheld most of the amended qui tam allegations as sufficiently specific, but refused to reconsider his limitations ruling. However, the district court certified the limitations issue for immediate appellate review under 28 U.S.C. § 1292(b).

The United States Court of Appeals for the Fourth Circuit reversed. The majority found no statutory ambiguity and hence no reason to refuse to apply the express statutory command that the limitations period for all causes of action under section 3730 run six years from the alleged violation on which the employee blew the whistle and, consequently, faced retaliation. The majority was unimpressed by the claim that possible anomalies that might be presented in other cases made the statute ambiguous (Pet. App. 17a-21a). Relying heavily on Judge Easterbrook's analysis for a unanimous Seventh Circuit in *Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994), the court also concluded that the supposed anomaly found below did not exist. After all, nothing in the statute requires a court to find that section 3729 was actually violated in order to decide whether whistleblowing was protected against retaliation, just as retaliation provisions in other federal statutes are generally read to protect good faith reports of wrongdoing (Pet. App. 22a-24a). Nor was the court troubled by another claimed anomaly, the possibility that some employees might suffer retaliation more than six years after the underlying False Claims Act violation. The court reasoned that, should such a case ever be presented, the limitations period could be subject to equitable tolling or equitable estoppel (Pet App. 20a-21a).

Judge Wilkinson dissented, arguing that, despite the statute's clear language, Congress could not have set the time

for suing for retaliatory discharge turn on something other than the discharge itself. (Pet. App. 35a36a). Moreover, because Congress changed the previous language of the limitations provision, which required suit "within 6 years from the date the violation was committed," to language forbidding suit "more than six years after the date on which the violation of section 3729 was committed," Congress must have intended the statute of limitations to apply only to those section 3730 claims that were brought over violations of section 3729 (Pet. App. 32a-35a). The dissent also expressed concern that an employer could simply wait for several years after the employee reported a false claim to exact its revenge, without ever explaining why there is any likelihood that a court would ever find a causal relation between protected activity and alleged retaliation when the adverse employer conduct is remote in time from the protected activity (Pet. App. 36a-39a). In addition to the anomalies rebutted by the majority, Judge Wilkinson also expressed concern that six years is simply too long to be a good limitations period. Because Congress would not choose a time frame well in excess of analogous state limitations periods, he reasoned, the express six-year period should be read to apply to as few claims as possible (Pet App. 29a).

REASONS FOR DENYING THE WRIT

Although the decision below conflicts with the decision of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (1998), the issue of the proper limitations period is a minor issue of statutory interpretation that is not causing substantial difficulties in the lower courts. In fact, it simply does not come up very often, with barely more than a dozen reported cases addressing the limitations issue for FCA retaliatory discharge claims over the eighteen years since that cause of action was adopted, or less than one limitations

decision per year. Moreover, the decision below represents the trend of decisions among the lower courts, and the Ninth Circuit's reasoning simply does not present a persuasive case for disregarding the plain language of the statute or for delving into legislative history.

Additionally, the supposed anomalies that have concerned a few judges are more theoretical than real. Although all the courts required to decide this question, except the Ninth Circuit, have applied the FCA's own limitations period, there is not a single reported case presenting the hypothetical scenarios about which the Ninth Circuit and the dissent have expressed concern. There is no reason to grant plenary review instead of allowing the Ninth Circuit's approach to become more isolated.

1. The petition is correct in one respect. There is a disagreement between the holdings of the Ninth Circuit in *Lujan* and the decision below, in that the Ninth Circuit has held that the FCA does not provide a limitations period for claims of employees that they have suffered retaliation for blowing the whistle on FCA violations. The court below acted in accordance with the Seventh Circuit's decision in *Neal*; indeed, the decision below is in accord with the holdings in **every** court outside the Ninth Circuit that has addressed the issue, including the nonprecedential decision of the Third Circuit in *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003).[2] The fact remains, however, that counsel's research has identified barely more than a dozen reported decisions that have addressed the limitations period for such suits, and most of them are from courts in the Fourth or Ninth

[2] *E.g.*, *U.S. ex rel. Tillson v. Lockheed Martin Energy Systems*, 2004 WL 2403114 (W.D. Ky. 2004); *Grand ex rel. U.S. v. Northrop Corp.*, 811 F. Supp. 333 (S.D. Ohio 1992).

Circuits. Indeed, counsel have been able to identify only one decision in which a judge expressed tentative agreement with the Ninth Circuit's position, and in that case it was unnecessary to choose between borrowing a state limitation and applying the FCA's six year period because the suit would have been timely under either one.[3] Thus, although petitioners argue that it is imperative that this Court act now to resolve the conflict among the circuits, because thousands of FCA cases have been filed since 1986, it is apparent that the issue of the proper limitations period for retaliation claims is **not** one that is roiling the lower courts. Rather than rushing to resolve this minor conflict, respondents suggest that it may be better to wait to see whether the consensus continues to develop everywhere except the Ninth Circuit, and whether the Ninth Circuit reconsiders its minority position. The conflict may thus vanish without any need for the Court's intervention.

Moreover, the issue here is one pertaining not to the standards for primary conduct, but only the time within which that primary conduct must be litigated. Once employers know what limitations period has been adopted within their circuit, they can easily adopt record retention policies that will prepare them for the possibility of particular kinds of litigation. There is no great need to decide this question now.

2. Neither the Ninth Circuit in *Lujan*, nor the dissenting opinion below, nor petitioners, have offered any construction of the actual language of the statute that supports either their holding, or even their contention that there is sufficient ambiguity in the language that resort to legislative history is required. Section 3729 of the FCA forbids the knowing

[3] *U.S. ex rel. Ackley v. International Business Machines Corp.*, 110 F. Supp. 2d 395 (D. Md. 2000).

submission of false or fraudulent claims for payment or approval. Section 3730 then creates three causes of action – by the Attorney General if he finds that a person has violated section 3729, § 3730(a); by any person as a qui tam action, brought in the name of the government, for a violation of section 3729, § 3730(b)-(f); and by an employee who suffers retaliation at the hands of his employer "because of lawful acts . . . in furtherance of an action under this section." § 3730(h). Section 3731, in turn, provides as follows:

(b) A civil action under section 3730 may not be brought —

> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

There is no question that Wilson has brought a "civil action under section 3730." Nor is there any dispute that she brought her suit less than six years before the alleged violations of section 3729 on which her complaints were based. Accordingly, under the plain language of section 3731(b)(1), her action is timely. No construction of the relevant language has been presented that would permit the section to be construed any other way.

3. Petitioners' theories, and the reasoning of the judges who have rejected the plain language of section 3731(b)(1), are

all based on the proposition that application of that section, or of section 3731(b)(2), would supposedly present a variety of anomalies and cause "claim shopping," as employees sought to shoehorn other kinds of whistleblowing claims into the FCA, and hence that the Court should infer that Congress would not have intended to enact such an absurd statute. Accordingly, it is contended that resort to legislative history is appropriate to decide what Congress really meant. Of course, there is no need to consider legislative history if the language of the statute is clear, and in any event the supposed anomalies not only do not exist, but depend on constructions of the statutes that the lower courts, even the Ninth Circuit, have consistently refused to embrace in considering questions other than the application of section 3731(b) to retaliation actions.

Each of these hypotheticals offers a fascinating puzzle, requiring construction of other provisions of the FCA; they are ventilated in the opinions below as well as in the Seventh Circuit and Ninth Circuit decisions, and in *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 440-446 (E.D.Va. 2002). There is, however, a decided air of unreality to this aspect of petitioners' argument, because the crucial point is that the concerns expressed **are** strictly hypothetical – not only need they not be resolved to decide this case, but petitioners do not identify a single litigated case in the 18 years since the statute was enacted, or the ten years since the Seventh Circuit's plain-meaning decision in *Neal v. Honeywell*, in which the hypothetical facts were presented. Nor did counsel's research on Westlaw turn up a single case presenting the hypothetical facts on which petitioners' arguments are based. Accordingly, there is no need for this Court to decide, at this time, how each of those hypotheticals should be decided.

4. Petitioners' argument creates anomalies of its own. Petitioners argue simultaneously that state-law limitations periods need to be borrowed to protect employees who file suit

more than six years after the underlying false claim from being discharged (even though no such employee has ever filed an FCA retaliation suit so far as the reported cases reveal), while at the same time they complain that six years is too long for a statute of limitations, especially in the labor context where back pay may be at issue. This is, of course, a strange argument in that no-one disputes that Congress did, in fact, choose a six-year limitations period for most FCA claims. This Court, however, has flatly stated that a limitations period of six years "is not long enough to frustrate the interest in a relatively rapid disposition of labor disputes." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 36 (1995).

North Star Steel reminds us of yet another way in which petitioners' argument is anomalous – although the Court has now ruled that municipalities can be liable for FCA violations, the FCA is aimed primarily at private employers, and private employers tend to be concerned about the forum shopping that borrowing limitations periods from state law would encourage. *Id.*, at 36-37. In *Neal v Honeywell*, 33 F.3d at 865, Judge Easterbrook identified a major advantage of applying section 3731 as written – it makes the limitations period run from an easily determined point in time, the time of the claim on which the employee blew the whistle. Following the FCA's plain meaning by using a uniform federal period also promotes predictability and ease of judicial administration by avoiding the need to decide which state or federal statute provides the best analogy for borrowing. There is no reason, then, for this Court to step in to prevent the law from continuing to develop in the lower courts as the Ninth Circuit's approach becomes more and more the outlier.

5. Although petitioners have rummaged through the legislative history to try to cast doubt on whether Congress deliberately planned to apply the section 3731 limitations period to the section 3730(h) cause of action, they have shown

only that the limitations period was being revised at a time when the cause of action for retaliation was not yet incorporated into section 3730. Petitioners have identified no reason to believe that Congress would have wanted to have a uniform federal limitations period for most FCA claims, while asking the courts to borrow analogous state limitations periods for retaliation claims. Indeed, petitioners amply show that when adopting whistleblower provisions for other federal statutes, Congress routinely includes an express limitations period, although they tend to be shorter, in part because they are periods for filing short administrative forms rather than lawsuits. At best, it seems likely that Congress drafted the statute carelessly, and never considered what limitations period might apply to the new cause of action for retaliatory discharge. While the Court waits for Congress to fix its "mistake," if it chooses to do so, there is no reason not to apply the statute the way Congress wrote it – as extending to **all** of the three causes of action provided by section 3730 the express limitations period provided by section 3731(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(8)

No. 04-169

In the

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JULY 28, 2004
CERTIORARI GRANTED: JANUARY 7, 2005

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Order granting permission to appeal interlocutory order, Filed Jan. 24, 2003 40

NOTICE

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the Appendix to the Petition for *Writ of Certiorari*:

Magistrate Judge's Memorandum and Recommendation, dated Mar. 26, 2002 ..... Pet. App. 89a
Memorandum of Opinion allowing Defendants' motions to dismiss, dated May 30, 2002 ..... Pet. App. 46a
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Order further amending Apr. 29, 2004 Opinion dated May 25, 2004 ..... Pet. App. 44a
Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and rehearing *en banc*, entered June 28, 2004 ..... Pet. App. 122a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 03-1122
UNITED STATES EX REL. WILSON
v.
GRAHAM COUNTY SOIL & WATER
CONSERVATION DISTRICT, ET AL.

DOCKET ENTRIES

DATE	PROCEEDINGS
1/24/03	Civil Case docketed.
	* * * *
4/29/04	Judgment order filed. Decision: VACATED AND REMANDED. EOD Date: 4/29/04. [03-1122] - [3976017] (pks)
5/10/04	Order amending opinion filed. [03-1122] - [3981404] (dsd)
5/25/04	Order amending opinion filed. [03-1122] - [3989678] (jsj)
	* * * *
6/14/04	Petition filed by Appellee Eddie Wood, Appellee C. B. Newton, Appellee Bill Tipton, Appellee Cherokee County Soil for rehearing. Number of copies filed: 20 [3999111-1]., for rehearing en banc. Number of copies filed: 20 [3999111-2] [03-1122] - [3999111] (jsj)

6/14/04	Petition filed by Appellee Graham County, Appellee Lloyd Millsaps, Appellee Allen DeHart, Appellee Gerald Phillips, for rehearing. Number of copies filed: 20 [3999572-1]., for rehearing en banc. Number of copies filed: 20 [3999572-2] [03-1122] - [3999572] (jsj)
6/28/04	COURT ORDER filed [4007292] denying motion for rehearing [3999111-1] EOD Date: 6/28/04., denying motion for rehearing en banc [399911-2] EOD Date: 6/28/04., denying motion for rehearing [3999572-1] EOD Date: 6/28/04., denying motion for rehearing en banc [3999572-2] EOD Date: 6/28/04. Copies to all parties. [4007292] [03-1122] (jsj)
7/6/04	Mandate issued. ~ [4010842] [03-1122] (jsj)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
(BRYSON CITY DIVISION)

Docket No. 2:01-CV-19T
UNITED STATES EX REL. WILSON

v.

CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
1/25/01	1	COMPLAINT Filing Fee $150.00 Receipt # 16464 (sdc) [Entry date 01/29/01]
		* * * *
7/23/01	7	NOTICE of Election to Decline Intervention by United States (sdc) [Entry date 07/24/01]
7/27/01	8	ORDER (1) [7-1] govt's Notice of Election to Decline Intervention GRANTED & UNSEALED; (2) complaint UNSEALED & counsel for relators directed to serve upon defts. Complaint, along w/

7/27/01 cont.	8	appropriate process within 120 days of filing of this Order; (3) all other pleadings, briefs & orders previously filed shall remain SEALED & not served upon defts.; (4) Clerk INSTRUCTED to denominate US Atty as interested party upon docket of this matter & send copies to him in ordinary course & (5) counsel for respective parties INSTRUCTED to send copies of any materials filed in this matter to US Atty confirming such compliance in certificate of service (signed by Judge Max O. Cogburn, Jr.) [EOD DATE: 7/30/01] (sdc) [Entry date 07/30/01
		****
11/28/01	31	MOTION with Memorandum in Support by Graham Co Bd of Co C, Raymond Williams, Dale Wiggins, Lynn Cody to Dismiss referred to: Judge Max O. Cogburn, Jr. (pdf) [Entry date 11/29/01]
		****

12/21/01	61	MOTION by Cherokee Co Soil & W, Bill NMM Tipton, Eddie Wood, C. B. Newton to Dismiss and for More Definite Statement referred to: Judge Max O. Cogburn, Jr. (pdf) [Entry date 12/21/01]
12/21/01	62	MOTION with Memorandum in support by Cherokee Co Bd of Co, Charles Laney, Eugene Morrow, George Postell to Dismiss referred to: Judge Max O. Cogburn, Jr. (pdf) [Entry date 12/21/01]
		****
1/18/02	75	MOTION by Karen T. Wilson to Amend [1-1] complaint referred to: Judge Max O. Cogburn, Jr. (ejb) [Entry date 01/22/02]
		****
1/22/02	77	NOTICE OF MOTION AND MOTION with Memorandum in Support by Graham Co Soil & Wat, Gerald Phillips, Allen Dehart, Jimmy Orr, Lloyd Millsaps Dismiss referred to: Judge Max O. Cogburn Jr. (ejb) [Entry date 01/22/02]
		****

3/25/02	95	MEMORANDUM AND RECOMMENDATIONS of Judge Max O. Cogburn Jr. Re: [31-1] motion to Dismiss, [61-1] motion to Dismiss, [61-2] motion for More Definite Statement, [62-1] motion to Dismiss, [75-1] motion to Amend [1-1] complaint, [77-1] motion to dismiss; Motions no longer referred to Magistrate Judge Cogburn; Objections to M and R due by 4/11/02 (ejb) [Entry date 03/25/02]
4/5/02	96	OBJECTION by Karen T. Wilson to [95-1] memorandum & recommendations (ejb) [Entry date 04/09/02]
4/10/02	97	RESPONSE by Graham Co Bd of Co C, Dale Wiggins, Raymond Williams, Lynn Cody in opposition to [96-1] Objections to M&R by Karen T. Wilson (ejb) [Entry date 04/12/02]

5/30/02	98	MEMORANDUM OPINION and ORDER Defts. motions to dismiss Pltf.'s 1st cause of action as a qui tem relator under False Claims Act are DENIED without prejudice to renewal after filing of Pltf.'s 2nd Amended Complaint. Pltf.'s motion to amend ALLOWED, & the Court orders any amendment relate back to Complaint's original filing date. Pltf. Shall file her 2nd Amended Complaint within 20 days from entry of this Order. Defts.' motions to dismiss Pltf.'s 2nd cause of action for retaliatory discharge ALLOWED, & such claim DISMISSED WITH PREJUDICE as to all Defts. (signed by Judge Lacy H. Thornburg) Judgment Volume: 88 Page: 1 (ejb) [Entry date 05/31/02] [Edit date 05/31/02]

* * * *

7/31/02	117	MOTION by Karen T. Wilson for Reconsideration of [98-1] Retaliation Claim Order, or, in the Alternative for 28 U.S.C. Sec. 1292(b) Certification of Order referred to: Judge Lacy H. Thornburg (ejb) [Entry date 08/02/02]
		* * * *
9/19/02	122	MEMORANDUM OPINION & CERTIFICATION FOR APPEAL Ordering [107-1], [108-1] & [112-1] motions to dismiss filed 7/12/02 by Defts. Cherokee Dist, Tipton, Wood, Newton, Graham Dist, Phillips, Dehart & Millsaps pursuant to FRCvP 9(b) are DENIED as to Relator's claims pertaining to Fed Emergency Watershed Protection Program & the Farm Svcs Program; motions are ALLOWED as to Relator's remaining claims contained in Sections C & D of 2nd Amd Cmp & such claims are DISMISSED WITH PREJUDICE. ORDERED that

9/19/02 cont.	122	[107-1], [108-1] & [112-1] motions to dismiss filed 7/12/02 by Defts. Cherokee Dist. Tipton, Wood, Newton, Graham Dist, Phillips, Dehart, Millsaps, Graham Co, Williams, Wiggins & Lynn Cody pursuant to FRCvP 12(b) (6) are DENIED, except that motion of Newton, Tipton & Wood to dismiss Relator's claims against them in their individual capacities ALLOWED, & such claims are DISMISSED claims are DISMISSED WITH PREJUDICE. Relator's claims against these individual Defts. in their official capacities remain. Separate [109-1] motion to Dismiss filed by Jimmie Orr pursuant to FRCvP 12(b) (6) DENIED as moot as he is no longer a party to this action. Relator's [117-1] motion for Reconsideration of her claim for retaliation DENIED. Alternatively, relator's [117-2] motion for Certification of Memo and Order of 5/30/02, pursuant to

9/19/02 cont.	122	28 U.S.C. Sec. 1292(b) ALLOWED, & issue of proper statute of limitations for retaliatory discharge claim under False Claims Act, 31 U.S.C. Secs. 3729, et seq., is certified for interlocutory appeal (signed by Judge Lacy H. Thornburg) Judgment Volume: 89 Page: 47 (ejb) [Entry date 09/23/02] [Edit date 09/23/02]
7/9/04	131	JUDGMENT OF USCA (certified copy) Re: Interlocutory Appeal - VACATED AND REMANDED (ejb) [Entry date 07/13/04]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION

UNITED STATES EX REL. KAREN T. WILSON
Plaintiffs,

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, GRAHAM COUNTY BOARD OF COUNTY COMMISSIONERS, CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT, CHEROKEE COUNTY BOARD OF COUNTY COMMISSIONERS, RICHARD GREENE, CHERIE GREENE, WILLIAM TIMPSON, RICKY STILES, KEITH ORR, BETTY JEAN ORR, RAYMOND WILLIAMS, DALE WIGGINS, JOYCE LANE, GERALD PHILLIPS, ALLEN DEHART, JIMMY ORR, LLOYD MILLSAPS, JERRY WILLIAMS, BILLY BROWN, LYNN CODY, EUGENE MORROW, CHARLES LANE, CHARLES LANEY, GEORGE POSTELL, BILL TIPTON, LLOYD KISSELBURG, C.B. NEWTON, EDDIE WOOD, TED ORR, BERNICE ORR, JOHN DOE AND JOHN DOE CORPORATIONS AND GOVERNMENTAL ENTITIES 1-99,
Defendants.

CIVIL ACTION NO. 2:01CV19T
Jury Trial Requested
[FILED: JANUARY 25, 2001]

TO BE FILED *IN CAMERA* AND UNDER SEAL

COMPLAINT

1. This is an action by *qui tam* Relator Karen T. Wilson, in the name of the United States Government, to recover penalties and damages arising from false claims for

money submitted to the United States Government, and in her own name to obtain the relief needed to make her whole from the damages she suffered from violations of 31 U.S.C. § 3730(h). She is an "original source" of the information on which the allegations contained hereto are based, as that term is defined in 31 U.S.C. § 3730(e)(4).

Jurisdiction And Venue

2. This action arises under the False Claims Act, 31 U.S.C. § 3729 *et seq.* This Court has subject matter jurisdiction over this action pursuant to 31 U.S.C. § 3732(a) and 28 U.S.C. § 1331 in that this action arises under the laws of the United States.

3. Venue is proper in the United States District Court for the Western District of North Carolina pursuant to 28 U.S. C. §§ 1391(b), and 1391(c), and under 31 U.S.C. 3732(a) because at least one or more of the defendants can be found, resides and/or transacts business within the district, and the acts proscribed by the False Claims Act occurred within the district.

The Parties

4. Plaintiff-Relator Karen T. Wilson is a citizen and resident of the United States and North Carolina and resides in the Western District of North Carolina. She formerly was employed by Defendant Graham County Soil and Water Conservation District.

5. Defendant Graham County Soil & Water Conservation District is a local special-purpose governmental entity located in and servicing Graham

County, North Carolina (hereinafter referred to as "Graham County SWCD").

6. Defendant Graham County Board of County Commissioners is the political entity that governs Graham County, North Carolina (hereinafter referred to as "Graham County Commission").

7. Defendant Cherokee County Soil & Water Conservation District is a local special-purpose governmental entity located in and servicing Cherokee County, North Carolina (hereinafter referred to as "Cherokee County SWCD").

8. Defendant Cherokee County Board of County Commissioners is the political entity that governs Cherokee County. North Carolina (hereinafter referred to as "Cherokee County Commission").

9. Defendant Richard Greene is a citizen and resident of the United States and was an employee of the Natural Resources Conservation Service ("NRCS").

10. Defendant Cherie Greene is a citizen and resident of the United States and is the wife of defendant Richard Greene.

11. Defendant William Timpson is a citizen and resident of the United States and was an employee of the NRCS.

12. Defendant Ricky Stiles is a citizen and resident of the United States.

13. Defendant Keith Orr is a citizen and resident of the United States and was an employee of the Graham County SWCD.

14. Defendant Betty Jean Orr is a citizen and resident of the United States and is the wife of defendant Keith Orr.

15. Defendant Gerald Phillips is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

16. Defendant Allen Dehart is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

17. Defendant Jimmy Orr is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

18. Defendant Lloyd Millsaps is a citizen and resident of the United States and was a Supervisor of the Graham County SWCD at all relevant times.

19. Defendant Joyce Lane is a citizen and resident of the United States.

20. Defendant Jerry Williams is a citizen and resident of the United States.

21. Defendant Billy Brown is a citizen and resident of the United States. Upon information and belief, at all relevant times he was doing business as Brown Construction Company.

22. Defendant Dale Wiggins is a citizen and resident of the United States and was a Supervisor of the Graham County Commission at all relevant times.

23. Defendant Raymond Williams is a citizen and resident of the United States and was a Supervisor of the Graham County Commission at all relevant times.

24. Defendant Lynn Cody is a citizen and resident of the United States and was a Supervisor of the Graham County Commission at all relevant times.

25. Defendant Eugene Morrow is a citizen and resident of the United States and was a Supervisor of the Cherokee County Commission at all relevant times.

26. Defendant Charles Lane is a citizen and resident of the United States and a partner in G&L Farms in Graham County.

27. Defendant Charles Laney is a citizen and resident of the United States and was a Supervisor of the Cherokee County Commission at all relevant times.

28. Defendant George Postell is a citizen and resident of the United States and was a Supervisor of the Cherokee County Commission at all relevant times.

29. Defendant Bill Tipton is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

30. Defendant Lloyd Kisselburg is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

31. Defendant C.B. Newton is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

32. Defendant Eddie Wood is a citizen and resident of the United States and was a Supervisor of the Cherokee County SWCD at all relevant times.

33. Defendant Ted Orr is a citizen and resident of the United states and is the husband of Bernice Orr.

34. Defendant Bernice Orr is a citizen and resident of the United states and is the wife of Ted Orr.

35. Each defendant who is alleged herein to be or to have been either a Supervisor of the Graham County Commission or of the Graham County SWCD is being sued in his personal capacity for his actions taken as a member of the respective entity and/or for the actions of that entity that are alleged herein, as well as for any other actions taken by the defendant that are alleged herein. Upon information and belief, each such defendant participated in all of the actions that the respective entity is alleged herein to have taken.

36. Each defendant who is alleged herein to be or to have been either a Supervisor of the Cherokee County Commission or of the Cherokee County SWCD is being sued in his personal capacity for his actions taken as a member of the respective entity and/or for the actions of the

respective entity of which he is a member that are alleged herein. Upon information and belief, each such defendant participated in all of the actions that the respective entity is alleged herein to have taken.

37. Plaintiff-Relator Wilson is also pursuing claims for relief against Defendants listed as John Does and John Doe Corporations and Governmental Entities 1-100 because, while they have been participating and/or conspiring with the specific Defendants named in this Complaint in presenting or causing to be presented false or fraudulent claims to the United States, their names or the complete facts concerning their complicity presently are not known to Relator Wilson.

Factual Allegations

38. Defendants have violated the False Claims Act by perpetrating and participating in, and conspiring to participate in, various schemes to defraud the United States Government under financial aid programs for farmers and other landowners located in certain counties in western North Carolina, principally in the counties of Graham, Cherokee and Clay.

A. False Claims Under The Federal Emergency Watershed Protection Program

39. On January 18, 1993, Relator Wilson was hired as a part-time secretary at the Graham County SWCD.

40. Pursuant to the Emergency Watershed Protection Program, a disaster relief program funded by the United States Government, a grant program known as EWP-216

was instituted for Graham, Cherokee and Clay Counties in North Carolina for assistance for damages to streams and creeks caused by a storm in February 1995.

41. Defendant Keith Orr was appointed an inspector of the EWP-216 program by the Graham County SWCD.

42. Defendants presented false claims and/or made or caused to be made false records or statements to get false claims paid and/or conspired to defraud the United States Government by getting false or fraudulent claims paid under the EWP-216 program, thereby defrauding the United States Government of hundreds of thousands of dollars.

43. Defendants' actions in this regard include the following:

a. In a June 20, 1995 Graham County SWCD board meeting, Keith Orr presented the district a request for payment of $5,130 for EWP-216 work knowing that the claim was improper because he was ineligible to receive funds under the program because of his conflict of interest as inspector and because there had been no bidding on the contract as required by the EWP-216 program.

b. The Graham County SWCD board approved the payment and had it paid, despite knowing that the claim was improper for the aforementioned reasons, and requested from the Graham County Commission the corresponding EWP-216 funds.

c. Subsequent to this claim, in 1995 and 1996 Keith Orr made several other improper requests for payment under

the EWP-216 program utilizing the same procedures, which payments were approved by the Graham County SWCD board and Graham County Commission, despite their knowledge of their impropriety. These included the following: on August 31, 1995 a check for $6,725.00 was issued to Keith Orr; and on October 4, 1995 a check for $2,700.00 was issued to Keith Orr for an EWP-216 contract which did not exist.

d. Gerald Phillips, a supervisor at the Graham County SWCD, conspired with Orr and others to get Orr's false claims paid and instructed Relator Wilson that she should pay Keith Orr's claims whether or not Orr had done the work or not.

e. In addition to the above noted improprieties with Orr's claims, the claims were improper because Keith Orr had not performed some or any of the work for which he filed claims for payment and for which he was paid.

f. Keith Orr conspired with Richard Greene and William Timpson to file the aforementioned false claims and to share the payments from the claims among the three of them.

g. They also secretly and improperly sold logs and timber that they removed from landowners' property as part of the EWP-216 Program, and split the illegal proceeds.

h. Richard Greene also conspired with Ricky Stiles, a landowner, to file false claims under the EWP-216 program and/or Cost Share Program (defined below) and they did file

such claims and thereby improperly received funds from the program.

i. Upon information and belief, Richard Greene and William Timpson approved all of the payments made by NRCS, a branch of the United States Government, pursuant to the EWP-216 program, that ultimately went to Keith Orr, despite knowing that the claims of Orr were false.

j. Keith Orr, Richard Greene, William Timpson, Billy Brown and Brown Construction Company conspired to make similar false claims under the EWP-216 program for Clay and Cherokee Counties and split the proceeds from the false claims.

k. They did make such false claims and receive payment for them.

1. The Cherokee County SWCD and the Cherokee County Commission knowingly made false claims to the NRCC based on the aforementioned claims.

m. Cherokee County SWCD and the Cherokee County Commission committed additional violations of the False Claims Act by making false claims to the NRCC under the EWP-216 program by submitting claims for payments to unauthorized claimants, for payments based on claims for which there was no bidding although bidding was required under the program, and by otherwise paying for claims with the knowledge that the payments were improper.

B. False Claims Under The North Carolina Agricultural Cost Share Program

44. The North Carolina Agricultural Cost Share Program ("Cost Share Program") is a state program to help farmers improve water quality.

45. The Cost Share Program was administered by the local soil and water conservation district boards, including the Graham County SWCD Board.

46. Upon information and belief, the Cost Share Program was funded, at least in part, by federal funds.

47. Defendants presented false claims and/or made or caused to be made false records or statements to get false claims paid and/or conspired to defraud the United States Government by getting false or fraudulent claims paid under Cost Share Program.

48. Defendants' actions in this regard include the following:

a. Beginning before 1993, and through 1996, Richard Greene, William Timpson and Keith Orr and others conspired to make, and did make, false claims under the Agricultural Cost Share Program, defrauding the United States Government of hundreds of thousands of dollars.

b. These conspiracies included illegal sales of filter fabric to landowners at inflated prices in Cherokee County, Swain County and other counties in North Carolina.

c. Upon information and belief, these illegal sales were done in conspiracy with the SWCD boards and/or county commissions for the respective counties.

d. The conspirators also approved unqualified plans so that they could sell the pipe and filter fabric to farmers at inflated prices, and approved fraudulent plans with forged signatures of landowners and pocketed all of the payment when no work was performed.

e. The conspirators also filed forged "amendments" to plans adding work, and related expenses, that was never performed.

f. Defendants Richard Greene, Cherie Greene, Charles Lane and Joyce Lane made and/or approved false claims and/or conspired to have the false claims paid under the Cost Share Program in the name of G&L Farms (or a similar such name) and for property that they did not own.

g. On or around February 20, 1996, the Graham County SWCD Board was made aware that Defendant Keith Orr had not submitted any Cost Share Program plans for the year, which are required by the program, yet no action was taken against Defendant Keith Orr.

h. Ted Orr and Bernice Orr, along with Richard Greene, Keith Orr and William Timpson, made false claims and conspired to have the false claims paid under the Cost Share Program such that Ted and Bernice Orr requested and received $15,000 in funds for their farm in excess of the program's $15,000 per farm, per year limit in effect receiving

double the maximum amount to which they might have been entitled.

C. False Claims Under Farm Services Agency Programs

49. The Farm Services Agency (FSA) programs included programs for cropland and farmland improvement.

50. Upon information and belief, the FSA programs were funded, at least in part, with federal funds.

51. The federal technicians for the FSA programs for Graham County, and upon information and belief, the surrounding counties in North Carolina, were Richard Greene and William Timpson.

52. Defendants presented false claims and/or made or caused to be made false records or statements to get false claims paid and/or conspired to defraud the United States Government by getting false or fraudulent claims paid under FSA programs.

53. Defendants' actions in this regard include the following:

a. Richard Greene applied for and obtained funds from these programs by improperly approving his own application for funds, which project also did not meet the requirements of the programs for other reasons.

b. In 1995, Jerry Williams, a friend of Keith Orr, applied for and obtained FSA program funds for his trout

farm for which he failed to meet essential program requirements.

c. Upon information and belief, Defendants filed additional false claims under this program.

D. Other False Claims Act Violations

54. In addition to the actions noted above, Defendants committed other acts in violation of the False Claims Act with respect to the above-described programs and/or other programs funded, in whole or in part, by federal funds.

55. These acts included the following:

a. The Defendants failed to set up the required personnel policies and procedures.

b. Defendants falsified wage and salary reports.

c. Defendants approved various budgets for projects funded, in whole or in part, by federal funds, in violation of applicable guidelines and requirements.

d. Defendants approved and disbursed funds to pay "ghost" bids.

e. Defendants approved and disbursed the funds for the improper double billing of claims and projects.

f. Defendants approved and disbursed funds in the

absence of a contract, despite the program requirement that there be an existing contract.

g. Defendants approved and disbursed funds to Defendant Keith Orr under Ghost names.

E. Relator Wilson's Investigation And Reporting To Authorities And Defendants' Employment-Related Retaliation Against Her.

56. Subsequent to her reporting of the false claims, Relator Wilson experienced extreme harassment at her job by and/or with the knowledge and consent of her employer. Some instances of the harassment and retaliation are set forth below.

57. On November 16, 1995, when Defendants Richard Greene and Keith Orr became aware that Relator Wilson might report them, they went to the Graham County Finance Office and tried to get Sharon Crisp, a finance officer, to destroy certain EWP-216 documentation.

58. When that did not work, Defendants Richard Greene and Keith Orr then tried to get Relator Wilson to bill Graham County improperly and fraudulently for another 1,000 feet of seeding in order to cover up discrepancies in the EWP-216 program payments caused by earlier false claims.

59. Because of Relator Wilson's unwillingness to participate in Defendants' fraudulent activities and because she had reported those activities to the NRCS in December of 1995, she was continually harassed by Defendants,

including Graham County SWCD Board members, and Richard Greene, Keith Orr and their families with the Board's knowledge, acquiescence and/or approval.

60. As part of its harassment of Relator Wilson, the Graham County SWCD Board repeatedly criticized Wilson's work without cause.

61. On December 5,1995, a cassette tape of a recorded conversation was left at Relator Wilson's door. On the tape were voices that Relator Wilson identified as those of Richard Greene, Keith Orr and his father, Jimmy Orr, who is currently a Graham County SWCD supervisor.

62. The tape recorded a conversation in which Richard Greene and Keith Orr discussed plans to "get rid" of Relator Wilson by making false allegations against her.

63. On or around December 7, 1995, Keith Orr made threats against Relator Wilson to dissuade her from disclosing the contents of the tape to anyone.

64. On or around December 11, 1995, Relator Wilson sent a letter to Mr. Richard A. Gallo of NCRS detailing accusations of fraud and false claims against the SWCD Board and others.

65. Based on Wilson's letter, the Office of Inspector General ("OIG") of the USDA contacted Relator Wilson in late December 1995.

66. On or around December 21, 1995, OIG Agent Beth Marik interviewed Relator Wilson at her home for three

hours regarding Wilson's allegations of wrongdoing, including those concerning the false claims submitted under the EWP-216 and Cost Share Programs. Wilson gave the tape and other evidence she had to Marik.

67. On or around December 19, 1995, Defendant Jimmy Orr called Relator Wilson and threatened her regarding the tape.

68. On or around January 2, 1996, in an act of harassment Kim Crisp, a Graham County SWCD finance officer, telephoned Relator Wilson and reprimanded her for errors in a EWP-216 claim submitted by Keith Orr despite the fact that the Graham County SWCD Board had instructed Relator Wilson to process Mr. Orr's prior requests for payment even though they contained similar such errors.

69. In early January 1996, OIG Agent Ken Golec came to Relator Wilson's office and she showed him additional documentation of the various false claims and related improprieties. Agent Golec interviewed her and investigated her allegations.

70. Beginning in January 1996, agents of the State Bureau of Investigation ("SBI") also interviewed Relator Wilson several times concerning her allegations.

71. The investigations by OIG and SBI of Relator Wilson's allegations continued through 1998, and throughout their investigations their agents regularly contacted Relator Wilson, who assisted them in their investigations.

72. On or around January 11, 1996, Relator Wilson discovered a gun barrel on a desk in her office, which, upon information and belief, had been left by one of her co-workers in an attempt to intimidate and scare her.

73. On or around January 11, 1996, Relator Wilson showed Levourn Wiggins NRCS files which documented that Ted Orr and his wife, Bernice Orr, had obtained improperly Cost Share Program funds.

74. On or around January 16, 1996, Relator Wilson questioned the Graham County SWCD Board about a payment to Keith Orr that was improper because it was for a project that was required to be bid, but was not subjected to the bidding process.

75. On or around March 11, 1996, while Relator Wilson was in the local public library, she overheard Betty Jean Orr, Keith Orr's wife, who was employed by the library, say that she was going to use a six-shooter to shoot Wilson's husband Dennis and that she was going to scratch Relator Wilson's eyes out. Orr stated that it was "all Karen Wilson" and that no one had done anything wrong. Relator Wilson reported the comments to Orr's boss Marsh Clonts and to the USDA OIG.

76. In April 1996, Raymond Williams, Chairman of the Graham County Commission, attended an executive session of the Graham County SWCD Board, which Relator Wilson also attended. At that session, Williams threatened to eliminate Wilson's job by closing the SWCD office if she did not stop the federal investigation.

77. The entire Graham County SWCD Board heard Williams' threat but made no response.

78. Subsequent to Richard Greene and William Timpson being relieved of their duties in December of 1995 regarding Graham County, Keith Orr, his wife Betty Jean Orr and Cherie Greene occasionally drove by the business of Relator Wilson's parents while Relator Wilson was there and when they saw her they would stick up their middle fingers out the window, directing their obscene and hostile gesture to Relator Wilson.

79. From April 8 through April 12, 1996, Donna Moffitt and Diane Brooks from the North Carolina Department of Environment, Health and Natural Resources (DEHNR) conducted a compliance review. As a result of their review, the funds from DEHNR were stopped. Defendant Raymond Williams, a Graham County Commissioner, told Relator Wilson to continue paying Keith Orr even after the wrongdoing was discovered and the funds were suspended

80. Defendants continued to make various threats against Relator Wilson through May of 1996, which included telephone calls from Keith Orr's family to Wilson's home and office.

81. As a result of the severe stress from the threats and harassment, on June 26, 1996, Relator Wilson experienced symptoms of a heart attack and was forced to seek immediate medical help.

82. Because of her chest pains, Wilson's physician gave her an EKG exam and kept her under observation for several hours.

83. Wilson's physician also prescribed her anti-depressants and ordered her to take a three-month medical leave of absence from her position at the Graham County SWCD.

84. Complying with her physician's directive, Relator Wilson went on medical leave.

85. While on medical leave, Relator Wilson continued to take her medication and was essentially bed-ridden for over a month.

86. Relator Wilson was able to return to work on or about October 1996.

87. However, Defendants resumed their harassment of Relator Wilson once she returned to work. Her co-workers ostracized her and refused even to acknowledge her presence.

88. Unable to tolerate harassment any longer, Relator Wilson was forced to resign on March 3, 1997, effective March 7, 1997.

Count I -False Claims Act Violations

89. Relator Wilson hereby incorporates and re-alleges herein Paragraphs 1-88 as if fully set forth herein.

90. By engaging in the acts set forth above, Defendants, individually, and by and through their agents, officers and employees, in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733, (i) knowingly presented or caused to be presented to an officer or employee of the United States Government numerous false or fraudulent claims for payment or approval, (ii) knowingly made, used or caused to be made or used, false records or statements to get a false or fraudulent claim paid or approved by the Government; (iii) conspired to defraud the Government by getting a false or fraudulent claim allowed or paid; and/or committed other violations listed of the False Claims Act set forth in § 3729(a)(4)-(7).

91. The United States has been damaged as a result of Defendants', violations of the False Claims Act in amounts to be proven at trial.

92. The United States is entitled to treble damages based upon the amount of damage sustained by the United States as a result of Defendants' violations of 3l U.S.C. § 3729.

93. The United States is entitled to a civil penalty of between $5,000.00 and $10,000.00 as required by 31 U.S.C. § 3729(a) for each violation of the False Claims Act by the Defendants

94. Relator is also entitled to reasonable attorneys' fees and costs pursuant to 31 U.S.C. § 3730(d)(1).

Count II -False Claims Act Retaliation Violation

95. Relator Wilson hereby incorporates and realleges herein Paragraph 1-88 as if fully set forth herein.

96. The defendant supervisors of defendant Graham County SWCD were alter-egos and totally dominated and controlled the Graham County SWCD and/or used Graham County SWCD for their improper personal use and were therefore "de facto" employers of Relator Wilson.

97. Relator Wilson was discriminated against, harassed by, and constructively discharged from her employment by her employer, defendant Graham County SWCD and, by and thorough its officers, agents and employees, and/or by her de facto employers, the defendant supervisors of Graham County SWCD, because of lawful acts done by her in furtherance of an action and/or possible action under the False Claims Act and/or investigation of False Claim Act violations that could serve as a basis of an action under the False Claim Act, including her reporting of False Claims Acts violations to law enforcement officials and her participation in the investigation of those violations by law enforcement officials and her investigation of the actions of one or more of the defendants that are actionable under the False Claims Act.

98. The actions of defendant Graham County SWCD and/or its defendant Supervisors set forth above violated 31 U.S.C. § 3730 (h) and damaged Relator.

99. As alleged above, other defendants harassed Related Wilson in violation of 31 U.S.C. § 3730 (h) and/or assisted and/or conspired with defendant Graham County SWCD, its Supervisors and/or agents to harass Relator

Wilson in violation of 31 U.S.C. § 3730 (h) and are each subject to liability under that provision.

100. Therefore, Relator Wilson is entitled to the relief provided by 31 U.S.C. § 3730(h), including damages in an amount to be determined at trial.

Wherefore, with respect to Count I, the Relator, on behalf of himself and the United States, requests that this Court grant the following relief:

(a) That judgment against each named Defendant in an amount equal to three times the amount of damages the United States has sustained because of his or its actions, plus a civil penalty of $5,000 to $10,000 for each violation of 31 U.S.C. § 3729, and the costs of this action, with interest, including the costs of the United States for its expenses related to this action;

(b) That the Relator be awarded all costs incurred, including reasonable attorneys' fees;

(c) That in the event that the United States intervenes in this action, the Relator be awarded 25%, but in no event less than 15%, of the proceeds of the resulting judgment in or settlement of this action;

(d) That in the event that the United States does not intervene in this action, the Relator be awarded 30%, but in no event less than 25%, of the proceeds of the resulting judgment in or settlement of this action;

(e) That the Relator be awarded prejudgment interest; and

(f) That the United States and the Relator receive all relief both at law and at equity, as this Court determines is appropriate.

Wherefore, with respect to Count II, Relator requests that the Court grant the following relief:

(a) That Relator be awarded all the relief to which she is entitled pursuant to 31 U.S.C. § 3730 (h), including personal injury damages for emotional and mental distress, two times her back pay, interest on the back pay, front pay or reinstatement, attorneys fees and litigation costs; and

(b) Such other relief as the Court finds appropriate.

A TRIAL BY JURY IS DEMANDED.

This the 25th day of January, 2001.

Respectfully submitted,

KAREN T. WILSON

By:/s/_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

UNITED STATES *EX REL.* KAREN T. WILSON,
Plaintiff,

v.

CHEROKEE COUNTY SOIL AND WATER CONSERVATION DISTRICT, BILL TIPTON, EDDIE WOOD AND C.B. NEWTON,
Defendants.

NOTICE OF MOTION AND MOTION TO DISMISS BY DEFENDANTS CHEROKEE COUNTY SOIL AND WATER CONSERVATION DISTRICT, BILL TIPTON, EDDIE WOOD AND C.B. NEWTON; MOTION FOR A MORE DEFINITE STATEMENT
(Rules 12 and 9, F.R. Civ. P.)

[FILED: DECEMBER 21, 2001]

TO PLAINTIFF AND ALL INTERESTED PARTIES HEREIN:

PLEASE TAKE NOTICE that the Defendants named above hereby move for dismissal of the Complaint against them pursuant to Rule 12(b)(1), 12(b)(2), 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure. Should this Court deny these motions, Defendants move in the alternative for a more definite statement. This motion is based on the court file and records in this action, the

accompanying Memorandum, and upon any matters which may be heard by the Court.

Respectfully submitted, this the 20th day of December, 2001.

ROY COOPER
Attorney Genera]

/s/
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION
NO. 2:01-CV-19T

UNITED STATES *EX REL.* KAREN T. WILSON,
Plaintiff,

v.

GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT, *et al.*,.
Defendants.

NOTICE OF MOTION AND MOTION TO DISMISS BY DEFENDANTS GRAHAM COUNTY SOIL AND WATER CONSERVATION DISTRICT, GERALD PHILLIPS, ALLEN DEHART, JIMMIE ORR, AND LLOYD MILLSAPS
(Rules 12 and 9, F.R. Civ. P.)

[FILED: JANUARY 22, 2002]

TO PLAINTIFF AND ALL INTERESTED PARTIES HEREIN:

PLEASE TAKE NOTICE that the Defendants named above hereby move for dismissal of the Complaint against them pursuant to Rule 12(b)(6) and ule 9(b) of the Federal rules of Civil Procedure on the grounds that it fails to state a claim upon which relief can be granted. This motion is based upon the court file and records in this action, the accompanying memorandum of points and authorities and upon such additional evidence as may be presented at or before any hearing that may be set by the Court.

Dated: January 18, 2002.

/s/
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-256
CA-01-19-2

KAREN T. WILSON
Petitioner

and

UNITED STATES OF AMERICA, Ex Rel.
Party in Interest

v.

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; RICHARD GREENE; WILLIAM TIMPSON; KEITH ORR; RAYMOND WILLIAMS; DALE WIGGINS; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; JERRY WILLIAMS; BILLY BROWN; LYNN CODY; BILL TIPTON; C. B. NEWTON; EDDIE WOOD; GRAHAM COUNTY

Respondents

[FILED: JANUARY 24, 2003]

ORDER

Petitioner has filed a petition for permission to appeal an interlocutory order pursuant to 28 U.S.C. 1292(b).

The Court grants the petition for permission to appeal. The case shall proceed under case number 03-1122.

For the Court
/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
FEB 2 2 2004
OFFICE OF THE CLERK

(6)

No. 04-169

In the

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the six year limitations period set out in 31 U.S.C. § 3731(b) should be applied to retaliatory discharge actions under the False Claims Act or whether courts should apply the most closely analogous state limitations period.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners are Graham County Soil & Water Conservation District, Cherokee County Soil & Water Conservation District, Gerald Phillips, Allen DeHart, Lloyd Millsaps, Bill Tipton, C.B. Newton and Eddie Wood.

The plaintiff below, United States of America ex rel. Karen T. Wilson, is the respondent here.

Raymond Williams, Dale Wiggins, Lynn Cody, and Graham County were defendant-appellees in the court of appeals but did not petition for certiorari.

Richard Greene, William Timpson, Keith Orr, Jerry Williams and Billy Brown were listed in the caption of the court of appeals as defendant-appellees, but did not participate in the court of appeals and did not petition for certiorari.

Graham County Board of County Commissioners, Cherokee County Board of County Commissioners, Cherie Greene, Ricky Stiles, Betty Jean Orr, Joyce Lane, Jimmy Orr, Eugene Morrow, Charles Lane, Charles Laney, George Postell, Lloyd Kissleburg, Ted Orr, Bernice Orr, John Doe, John Doe Corporations, and defendant, Government Entities 1-99, were defendants in the district court but did not participate in the court of appeals proceedings.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Graham County Soil and Water Conservation District states that it is a public body corporate and politic created pursuant to N.C. Gen. Stat. § 139-5. Accordingly, it has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Cherokee County Soil and Water Conservation District also states that it is a public body corporate and politic created pursuant to N.C. Gen. Stat. § 139-5. Accordingly, it has no parent company, and no publicly held company owns 10% or more of its stock.

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JURISDICTION

The court of appeals entered its judgment on April 29, 2004 (Pet. App. 1a-41a), and rehearing was denied on June 28, 2004 (Pet. App. 122a-123a). The petition for writ of certiorari was filed on July 28, 2004, and was granted on January 7, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the False Claims Act, 31 U.S.C. §§ 3729-33. The False Claims Act is set out in Pet. App. 124a-158a.

STATEMENT OF THE CASE

On March 7, 1997, Plaintiff Karen T. Wilson [hereinafter "Wilson"] resigned as a secretary at the Graham County Soil & Water Conservation District. (J.A. 30) Over three years and ten months later, Wilson filed the present action. (J.A. 3, 11) Wilson alleges that she was harassed by Petitioners for exposing various false claims for reimbursement made to certain federally-funded programs and that she was forced to resign on March 3, 1997, effective March 7, 1997. (J.A. 32-33) Specifically, she claims that Petitioners retaliated against her in violation of 31 U.S.C. § 3730(h) of the False Claims Act. (J.A. 32-33)

Petitioners moved to dismiss Wilson's retaliatory discharge claim in that it was barred by the applicable limitations period, namely the three-year limitations period North Carolina law imposes on wrongful discharge claims, *see* N.C. GEN. STAT. § 1-52 (2005). (J.A. 36-39; Pet. App. 3a) The district court agreed that Wilson's retaliatory discharge claim was time-barred and dismissed this claim. (Pet. App. 46a-71a) On April 29, 2004, a divided panel of the Fourth Circuit reversed the district court. (Pet. App 1a-45a) The majority concluded that claims under 31 U.S.C. § 3730(h) are governed by the limitations period set out in 31 U.S.C. § 3731(b)(1) (a six year period). The majority's opinion focuses upon the language of 31 U.S.C. § 3731(b), which provides:

> A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b) (2000). The Fourth Circuit noted that section 3730, creates three separate causes of action. 367 F.3d at 248 (Pet. App. 5a). Section 3730(a) creates a cause of action that may be brought by the Attorney General when the Government has been damaged by a false claim. Section 3730(b) provides for the filing of a *qui tam* action by an individual. Section 3730(h) creates a cause of action for retaliatory discharge when an employee has been discriminated against for pursuing a false claim action. As the Fourth Circuit also noted, section 3729 "creates and defines the parameters of liability for presenting a false claim to the Government." 367 F.3d at 248 (Pet. App. 5a).

Relying upon the language of these sections, the Fourth Circuit concluded that Congress intended to bar any retaliatory discharge claim that is not brought within six years from the date the false claim was submitted to the Government: "[T]he effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be brought no more than six

years after the date on which the underlying violation was committed." 367 F.3d at 248 (Pet. App. 5a-6a). Recognizing that this issue has "divided both our sister circuits and courts within this circuit," the Fourth Circuit rejected the rationale of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998). 367 F.3d at 249 (Pet. App. 8a). In *Lujan*, the Ninth Circuit concluded that 31 U.S.C. § 3731(b) does not provide a limitations period for retaliatory discharge claims, because the limitations period in section 3731(b) only addresses violations of section 3729, and section 3729 has no bearing upon retaliatory discharge actions. In its decision, the Fourth Circuit expressly rejected the Ninth Circuit's decision and instead adopted the rationale of the Seventh Circuit in *Neal v. Honeywell Inc.*, 33 F.3d 860 (7th Cir. 1994).

Judge Wilkinson dissented. He reasoned that the majority's opinion cannot be squared with the literal language of the False Claims Act and is not consistent with congressional intent. Moreover, he concluded that the majority's interpretation of the False Claims Act "is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts." 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 35a).

SUMMARY OF ARGUMENT

Congress has not expressly provided a limitations period for a retaliatory discharge action brought under section 3730(h) of the False Claims Act. Section 3731(b) of the False Claims Act establishes a limitations period for an action brought by the United States under section 3730(a) and for a *qui tam* action filed under section 3730(b). Congress, however, did not intend for this limitations period to govern retaliatory discharge actions filed under section 3730(h).

The language and structure of section 3731(b) make clear that Congress did not intend for a six year limitations period to be applied to retaliatory discharge actions. Section 3731(b) is directly tied to a "violation of 3729." Whether a violation of section 3729 has occurred, however, is irrelevant to an action for retaliatory discharge. Indeed, to establish a claim for a retaliatory discharge, a plaintiff need not show a violation of section 3729. Rather, a plaintiff must merely hold a good-faith belief that a violation of the False Claims Act has occurred. Because a cause of action for retaliatory discharge does not involve a "violation of section 3729," by its own terms, section 3731(b) does not apply to an action for retaliatory discharge.

The Fourth Circuit's decision hinges entirely upon its reading of the phrase "a civil action under section 3730" as that phrase is used in section 3731(b). Congress, however, has used this phrase to mean different things in different sections and subsections of the False Claims Act. In certain subsections, Congress has used this phrase to refer only to an action brought by the United States under section 3730(a). In other subsections, this phrase means both an action brought by the United States under section 3730(a) and a *qui tam* action filed under section 3730(b). In still other subsections, the phrase includes actions under section 3730(a) and (b), as well as retaliatory discharge actions under section 3730(h). Because Congress has ascribed different meanings to this phrase, the specific meaning that Congress intended in section 3731(b) can only be discerned by an examination of the context in which the phrase is used. When read in context, it is clear that Congress did not use this phrase in section 3731(b) to include an action for retaliatory discharge.

The legislative history of the 1986 amendments to the False Claims Act confirms that Congress did not intend for section 3731(b) to apply to an action for retaliatory discharge. The whistle-blower provision set out in section 3730(h) was

modeled after eight other federal statutes. Because these statutes provide for reinstatement and backpay, Congress provided a limitations period of 180 days or less in these eight statutes. Moreover, in each of these statutes, the limitations period accrues with the act of discharge or retaliation. By contrast, under the Fourth Circuit's decision, the limitations period for a retaliatory discharge action under section 3730(h) is six years, and the six year period begins to run not upon the act of discharge, but upon the date of the underlying violation of the False Claims Act. The Fourth Circuit's construction of the False Claims Act is therefore incongruent with every other whistle-blower statute enacted by Congress.

The statutory interpretation adopted by the Fourth Circuit produces a result that is not only odd, but absurd. Tying the commencement of the limitations period in a retaliatory discharge action to anything other than the act of discharge or retaliation imposes a tremendous burden on employers and employees. It would also produce a myriad of bizarre outcomes (*e.g.*, an employee being barred from bringing a retaliatory discharge action based upon the statute of limitations when the act of discharge or retaliation has not yet occurred).

The Fourth Circuit erred in applying the general limitations period of section 3731(b) to a retaliatory discharge action under section 3730(h). Because Congress has not expressly provided for a limitations period for a retaliatory discharge action under section 3730(h), federal courts should apply the most closely analogous state statute of limitations.

ARGUMENT

In the absence of an express federal statute of limitations, federal courts should apply the statute of limitations for the most closely analogous state limitations period. *See Reed v. United Transp. Union*, 488 U.S. 319, 323-24 (1989).

In that Congress has failed to expressly set out a limitations period for a retaliatory discharge action under 31 U.S.C. § 3730(h), the Fourth Circuit erred by applying the six year limitations period of 31 U.S.C. § 3731(b) rather than turning to the most closely analogous limitations period under North Carolina law.

I. CONGRESS DID NOT EXPRESSLY PROVIDE A LIMITATIONS PERIOD FOR A RETALIATORY DISCHARGE ACTION BROUGHT UNDER 31 U.S.C. § 3730(h).

The starting point for interpreting the False Claims Act is the text of the statute. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The sole limitations provision contained in the False Claims Act is as follows:

> A civil action under section 3730 may not be brought –
>
> (1) more than 6 years after the date on which the violation of 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

A. By its very language, section 3731(b) applies only to violations of section 3729.

The language and structure of section 3731(b) demonstrate that Congress did not intend to apply a six year limitations period to a retaliatory discharge action brought under 31 U.S.C. § 3730(h). The retaliatory discharge provision of the False Claims Act, 31 U.S.C. § 3730(h), provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C. § 3730(h) (2000). Section 3729 of the False Claims Act, 31 U.S.C. § 3729, sets out the conduct that constitutes the submission of a false claim to the Government. Section 3729

speaks only to the underlying False Claims Act violation and contains no reference to wrongful discharge or any act that would constitute a violation of 31 U.S.C. § 3730(h).

Section 3731(b) provides that a "civil action under section 3730" may be brought within six years of "the date on which the violation of 3729 is committed." This express reference to section 3729 establishes that section 3731(b) only provides the limitations period for an underlying violation of the False Claims Act, not a retaliatory discharge claim. As Judge Wilkinson explained in his dissent:

> The text of [31 U.S.C. § 3731(b)] could not be more plain. The six-year period is tied to a "violation of section 3729" and nothing else. Because an anti-retaliation claim does not involve a "violation of section 3729" but instead a violation of section 3730(h), by its own terms section 3731(b)(1) cannot apply. Section 3729 addresses only the submission of false claims to the federal government. Section 3729 does not address retaliatory actions by employers against whistle-blowing employees.

367 F.3d at 258 (Wilkinson, J., dissenting) (Pet. App. 31a).

The limitations period in section 3731(b) is tied solely to a "violation of section 3729." Section 3729, in turn, "strictly addresses false claims, not retaliation claims." *Lujan*, 162 F.3d at 1034. Thus, the language of the limitations period set out in section 3731(b) "clearly speaks only to the underlying False Claims Act violation." JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.11[A], at 4-204 (2d ed. Supp. 2000). As one commentator has noted:

> The statute of limitations provision in section 3731(b) clearly does not apply to section

> 3730(h) actions because it is expressly limited to violations of section 3729. As all courts have held, one need not allege a violation of section 3729 to have a cause of action under section 3730(h); one need only allege that one was retaliated against for investigating whether such an action could be filed. Therefore, because the federal cause of action does not supply a statute of limitations . . . , courts should apply the most closely analogous statute of limitations under state law.

ROBERT SALCIDO, FALSE CLAIMS ACT AND THE HEALTHCARE INDUSTRY: COUNSELING AND LITIGATION 278 (1999) (footnote omitted).

The structure of 31 U.S.C. § 3731(b) also shows that Congress did not contemplate that this provision would be used by courts to fill in a limitations period for a retaliatory discharge action. Under section 3731(b), Congress created a two-step process for determining whether an action based upon a violation of section 3729 has been timely asserted. First, section 3731(b)(1) provides that the action must be brought within six years of the date of the violation of section 3729. Second, section 3731(b)(2) extends the limitations period when the Government did not know nor reasonably should have known of the violation. Specifically, section 3731(b)(2) provides for a three year tolling of the limitations period from "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." 31 U.S.C. § 3731(b)(2).

The Fourth Circuit's majority opinion recognized that section 3731(b)(2) is not applicable to a retaliatory discharge action. 367 F.3d at 248 n.1 (Pet. App. 6a). There is no "official of the United States charged with responsibility to act"

when an employee alleges retaliation under the False Claims Act. Thus, in applying section 3731(b) to a retaliatory discharge action, the Fourth Circuit effectively discarded section 3731(b)(2) - over half of the section upon which it relies.

Furthermore, the purpose of the limitations periods set out in section 3731(b)(1) and (b)(2) directly relates to the nature of fraudulent conduct, not to retaliation by an employer against a whistle-blowing employee. Congress established the six year limitation period of section 3731(b)(1) and the tolling provision of section 3731(b)(2) because fraud is difficult to uncover and trace. S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280. In a retaliatory discharge action, however, the act of discharge or retaliation is open and obvious to all. Thus, neither the express language of section 3731 nor its underlying purpose suggests it should be applied to a retaliatory discharge action.

B. Because Congress has used the phrase an "action under section 3730" to mean different things under the False Claims Act, the phrase, as used in section 3731(b), should not be read to include a retaliatory discharge action.

The Fourth Circuit's opinion focuses upon the fact that section 3731(b) refers to a six year limitations period in connection with an "action under section 3730." The phrase an "action under section 3730" is used six times in the False Claims Act. 31 U.S.C. §§ 3731(a), (b) & (c), 3732(a) & (b), 3733(a)(1). In various portions of the False Claims Act, Congress appears to have used the phrase as shorthand for an action brought by the United States under section 3730(a). 31 U.S.C. §§ 3731(c), 3733(a)(1). In other places, Congress apparently intended the phrase to mean both an action brought

by the United States under section 3730(a) and a *qui tam* action under section 3730(b). *See* 31 U.S.C. § 3732(b). In other portions of the False Claims Act, Congress apparently intended the phrase to mean an action under section 3730(a), an action under 3730(b) and a retaliatory discharge action under section 3730(h). *See* 31 U.S.C. § 3731(a). In still other places, Congress' intent is far from clear. *Compare* 31 U.S.C. § 3732(a) (establishing a venue provision as to "any action under section 3730") *with* 31 U.S.C. § 3730(h) (addressing venue in retaliatory discharge actions). Accordingly, a complete reading of the False Claims Act reveals that the phrase an "action under section 3730" as used in 31 U.S.C. § 3731(b) is ambiguous.

Congress' use of the phrase "an action . . . under section 3730" in section 3731(c) is particularly instructive. Section 3731(c) provides:

> (c) In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

31 U.S.C. § 3731(c) (emphasis added). The only action that the federal government can bring under the False Claims Act is an action by the Attorney General under section 3730(a) to recover damages arising from a false claim. When section 3731(c) is read in light of sections 3730 and 3729, the effect of section 3731(c) is as follows:

> In an action brought under section [3730(a) by the United States,] the United States shall be required to prove all essential elements of the cause of action, including damages by a preponderance of the evidence.

Section 3731(c) illustrates that when Congress uses the phrase "an action under section 3730" in the False Claims Act, that phrase does not necessarily include an action for retaliatory discharge under section 3730(h).

Similarly, in section 3732(b), Congress used the phrase "an action brought under section 3730" as shorthand for an action brought by the United States under section 3730(a) and a *qui tam* action under section 3730(b). Section 3732(b) states:

> **(b) Claims under State law.**– The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as *an action brought under section 3730.*

31 U.S.C. § 3732(b) (2000) (second emphasis added). Here, the phrase "an action brought under section 3730" clearly does not encompass a retaliatory discharge action under 3730(h). An action for retaliatory discharge is by its very nature personal to the affected employee. Such discharge or retaliation simply cannot give rise to an action by the State "for recovery of funds paid by a State or local government."

Clearly, Congress could have avoided using the phrase "an action under section 3730" and instead used the phrase "an action under subsection (a) of section 3730" when it intended to refer solely to an action by the Government. Congress also could have used the phrase "an action under subsection (a) or (b) of section 3730" when it intended to refer to both an action by the Government and a *qui tam* action. In fact, Congress did exactly this in one subsection of the False Claims Act. 31 U.S.C. § 3731(d) (2000) (using the phrase "any action . . . under subsection (a) or (b) of section 3730"). Regrettably,

Congress did not consistently use such precise phraseology throughout the False Claims Act.

Congress' lack of precision in drafting is particularly acute in section 3730. For example, in two places, section 3730 refers to the "Government Accounting Office" when Congress apparently intended to refer to the General Accounting Office. 31 U.S.C. § 3730(d)(1), (e)(4)(A) (2000). Moreover, in the *qui tam* provisions of section 3730, Congress jumps from using the phrase an action "under this section" to an action "under this subsection" when only the latter phrase is appropriate. 31 U.S.C. § 3730(b)(3), (b)(5) (2000). The errors that plague Congress' word choice in section 3730 caused one court to note that this portion of the False Claims Act "does not reflect careful drafting or a precise use of language." *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 387 (3d Cir. 1999). Congress' use of the phrase "an action under 3730" to mean different things in different sections and subsections of the False Claims Act underscores this lack of precision and clarity in drafting.

Because the phrase "an action under section 3730" means different things throughout the False Claims Act, the phrase cannot be uniformly read to include all three causes of action created by section 3730. Given Congress' disparate use of the phrase throughout the False Claims Act, the phrase, if read in isolation, is ambiguous. Rather, the phrase can only be given meaning if read in context. For "it is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Reno v. Koray*, 515 U.S. 50, 56 (1995) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)); *see also Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 466-67 (2004) (noting that statutory language must be read in context rather than viewed in isolation). When read in context, it is clear that Congress only intended the six year limitations period

of section 3731(b) to apply to violations of section 3729, not to relatiatory discharge actions.

C. The Fourth Circuit's decision misconstrues congressional intent.

As set out in the legislative history of the 1986 amendments to the False Claims Act, the Act's whistle-blower provisions were modeled after eight other statutes that had been previously enacted by Congress:

> [T]he Committee seeks to halt companies and individuals from using the threat of economic retaliation to silence "whistleblowers," as well as assure those who may be considering exposing fraud that they are legally protected from retaliatory acts.
>
> In forming these protections, the Committee was guided by the whistle-blower protection provisions found in Federal safety and environmental statutes including the Federal Surface Mining Act, 30 U.S.C. 1293, Energy Reorganization Act, 42 U.S.C. 5851, Clean Air Act, 42 U.S.C. 7622, Safe Drinking Water Act 42 U.S.C. 300j-9, Solid Waste Disposal Act, 42. U.S.C. 6971, Water Pollution Control Act, 33 U.S.C. 1367, Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9610, and Toxic Substances Control Act, 15 U.S.C. 2622.

S. REP. NO. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5299. Like 31 U.S.C. § 3730(h), each of these eight whistle-blower statutes provides that an employee who has suffered retaliation may be reinstated to his or her

position and recover back pay. These statutes further provide that an employee loses his or her right to pursue a whistle-blower claim unless it is asserted within a relatively short time period from the discharge. The longest filing period that any of these eight statutes allows is 180 days from the discharge or retaliation. The vast majority of these statutes provide that a claim must be asserted within 30 days of discharge.

In contrast to these eight statutes, the Fourth Circuit concluded that the time period for filing a retaliation claim under the False Claims Act is six years and that this period runs from the date of the underlying False Claims Act violation rather than the date of the retaliatory act. Other whistle-blower statutes enacted by Congress do not have limitations period even remotely approaching six years.[1]

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[1] *See* Federal Deposit Ins. Act, 12 U.S.C. § 1831j (2000) (two year limitations period); Fed. Credit Union Act, 12 U.S.C. § 1790b(b)(2000) (two years); Fed. Home Loan Bank Act, 12 U.S.C. § 1441a(q)(2) (2000)(two years); Nat'l Labor Relations Act, 29 U.S.C. §§ 158, 160 (2000)(six months); Surface Transp. Assistance Act, 49 U.S.C. § 31105 (2000)(180 days); Migrant and Seasonal Agric. Workers Protection Act, 29 U.S.C. § 1855 (2000)(180 days); Energy Reorganization Act, 42 U.S.C. § 5851 (2000)(180 days); TSCA (asbestos), 15 U.S.C. § 2651 (2000)(90 days); Sarbanes-Oxley, 18 U.S.C. § 1514A (Supp. II 2002)(90 days); Aviation Inv. and Reform Act, 49 U.S.C. § 42121 (2000)(90 days); Fed. Mine Safety and Health Act, 30 U.S.C. § 815 (2000)(60 days); Safe Containers for Int'l Cargo Act, 46 U.S.C. app. § 1506 (2000) (60 days); TSCA, 15 U.S.C. § 2622 (2000)(30 days); Fed. Surface Mining Act, 30 U.S.C. § 1293 (2000)(30 days); Water Pollution Control Act, 33 U.S.C. § 1367 (2000)(30 days); Safe Drinking Water Act, 42 U.S.C. § 300j-9 (2000)(30 days); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000)(30 days); Clean Air Act, 42 U.S.C. § 7622 (2000)(30 days); CERCLA, 42 U.S.C. § 9610 (2000)(30 days). On other occasions, Congress has declined to specifically adopt a limitations period. *See* ERISA, 29 U.S.C. § 1140 (2000); Coast Guard Authorization Act, 46 U.S.C. § 2114 (2000).

The Fourth Circuit's interpretation of 31 U.S.C. § 3730(h) also constitutes a significant departure from every other whistle-blower statute enacted by Congress in that it ties the commencement of the limitations period to the underlying statutory violation rather than the date of the discharge. Had Congress truly intended to make such a radical departure from other whistle-blower statutes, this intent would have undoubtedly been discussed at length during congressional debate. No such debate occurred. In fact, as set out below, *infra* pp. 19-21, the discussion of the 1986 amendments during congressional debate reflects that Congress did not intend the six year limitations period to apply to retaliatory discharge claims under 31 U.S.C. § 3730(h).

Sound public policy reasons exist for Congress' decision to enact relatively short limitations periods with respect to whistle-blower statutes. When a statute provides for reinstatement, the longer an employee delays in asserting his or her rights, the more difficult it is for the employer to reinsert the employee into the same position. Moreover, when Congress provides for recovery of back pay, a lengthy limitations period may result in economic waste in that it encourages an employee to sit on his or her claim in order to recover the greatest possible damages. *See, e.g., Truitt v. County of Wayne*, 148 F.3d 644, 648 (6th Cir. 1998) (Congress intended short limitations period when "damages such as backpay may be mounting"); *see also Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (limitations periods "protect employers from the burden of defending claims arising from employment decisions that are long past"). As Judge Posner has noted: "The statute of limitations is short in . . . most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990), *cert. denied*, 501 U.S. 1261 (1991).

Although the Fourth Circuit purports to base its decision on the legislative history of the 1986 amendments to the False Claims Act, the Fourth Circuit's interpretation of this legislative history is flawed. In its opinion, the Fourth Circuit notes that the original drafts of the House and Senate bills to amend the False Claims Act set out the retaliatory discharge provisions as a separate section of the statute (to be codified at 31 U.S.C. § 3734). *See* 367 F.3d at 252 (Pet. App. 15a-16a). Thereafter, Congress condensed the act by simply placing this proposed new section as a subsection within 31 U.S.C. § 3730. The majority opinion concludes that this renumbering of the statute evidences Congress' intent that a six year statute of limitations be applied to retaliatory discharges:

> Had § 3730(h) been enacted as a separate section as originally contemplated by the legislative history to the 1986 amendments, a claim of retaliation under the FCA would not constitute "[a] civil action under § 3730," and thus Congress's intent to have courts apply the most analogous state statute of limitations would be clear. Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply.

367 F.3d at 252 (citations omitted) (Pet. App. 16a). The Fourth Circuit, however, disregards the specific wording of section 3731(b) that was changed by the 1986 amendments.

Prior to 1986, section 3731(b) read: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982). When Congress created an action for retaliatory discharge, the language of section 3731(b) was amended so as

to tie this six year period to a "violation of section 3729." 31 U.S.C. § 3731(b)(1) (2000). If Congress had intended a retaliatory discharge action to be governed by a six year limitations period, there would have been no reason for Congress to have deleted the words "from the date the violation is committed" and substituted in its place the words "after the date on which the violation of section 3729 is committed." As the Ninth Circuit concluded in *Lujan*:

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 language of section 3731(b) intact when it enacted the 1986 amendments to the [False Claims Act]. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.

162 F.3d at 1034-35. Similarly, had Congress intended for the six year limitations period to apply to violations of section 3730(h), it would have amended section 3731(b) to say that the limitations period commenced with the "violation of section 3729 or 3730."

Both before and after the renumbering of the statute, Congress clearly understood and believed that this six year limitations provision would only be applied to violations of the False Claims Act brought on behalf of the Government (as opposed to retaliatory discharge claims brought by an employee for the sole benefit of the employee).

On December 12, 1985, the Senate Judiciary Committee reported favorably on the proposed amendments to the False

Claims Act (Senate Report No. 99-345, *reprinted in* 1986 U.S.C.C.A.N. 5266). As of that date, the retaliatory discharge provisions were to be set out as a separate section (31 U.S.C. § 3734) and had not yet been moved into 31 U.S.C. § 3730. In addition to adding whistle-blower protection to the False Claims Act, the proposed amendments enlarged the limitations period with respect to claims brought on behalf of the Government. In its discussion of this change, the Senate Report makes clear that the six year statute of limitations (as amended by the proposed legislation) only relates to False Claims Act violations brought for the benefit of the Government:

> Seventh, the subcommittee added a modification of the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted (current standard) or within 3 years of when **the Government** learned of a violation, whichever is later. The subcommittee agreed that because fraud is, by nature, deceptive, such tolling of the statute of limitations is necessary to ensure **the Government's** rights are not lost through a wrongdoer's successful deception.

S. REP. NO. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280 (emphases added). As reflected by this Senate Report, the proposed amendments (as they existed as of December 12, 1985) were not intended to create a six year limitations period for retaliatory discharge claims. Rather, the six year limitations period and the new tolling provision were limited to claims brought on behalf of **the Government** to "ensure **the Government's rights** are not lost."

In September 1986, Congress altered the bill as it had been reported by the Senate and House Judiciary Committees. As part of those changes, the retaliatory discharge provision (proposed as a new section 31 U.S.C. § 3734) was moved into 31 U.S.C. § 3730. 132 CONG. REC. 22,332 & 28,576 (1986). Following the renumbering of the statute, however, Congress continued to view the six year limitations period as being applicable only to False Claims Act violations brought on behalf of the Government. On September 9, 1986, Congressman Fish, one of the principal sponsors of the original House proposal, described the revised bill during floor debate as follows:

> Section 5 amends the statute of limitations to permit **the Government** to bring an action within 6 years of when the false claim is submitted, the current standard, or within 3 years after **the Government** learns of the violations, whichever is later.

132 CONG. REC. 22,337 (1986) (emphases added).

Thus, even after the consolidation of the whistle-blower provisions into section 3730, Congress believed that the six year limitations period was only applicable to claims brought on behalf of the Government. The six year limitations period was not intended to apply to employees making a retaliation claim for their own personal benefit. Rather than supporting the position taken by the Fourth Circuit, the legislative history of the 1986 amendments to the False Claims Act demonstrates that Congress did not intend to apply a six year statute of limitations to retaliatory discharge claims.

D. The Fourth Circuit's decision is illogical and creates an unmanageable scheme for determining when the limitations period commences.

Under the Fourth Circuit's decision, the limitations period for a retaliatory discharge claim under the False Claims Act begins to run from the date of "the violation of section 3729." Thus, the Fourth Circuit ties the limitations period not to the act of retaliation, but to the date of the underlying False Claims Act violation. In doing so, the Fourth Circuit produces a result that is illogical and contrary to every other whistle-blower statute enacted by Congress. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (Congress, in passing laws, should not be presumed to have intended "results that were not merely odd, but positively absurd"); *see also Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs*, 519 U.S. 248 (1997) (courts should avoid statutory construction that is "absurd or glaringly unjust").

First, the Fourth Circuit's interpretation of the False Claims Act leads to the absurd result that the retaliatory discharge claim of some whistle-blowers will be time-barred even before the act of discharge. Under the Fourth Circuit's decision, the limitations period begins running six years from the time the employer submits a false claim to the Government. If an employee discovers a false claim years after the claim was submitted and proceeds to blow the whistle, section 3730(h) will not protect the employee from retaliation. "[T]he idea that a statute of limitations could expire even before the cause of action comes into being is not one that we should jump to conclude that Congress intended to embrace." 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 31a). As courts and commentators have noted, it would be a "bizarre result" if an

employee who brings a false claim action immediately prior to the expiration of the six year period could be fired shortly thereafter and yet the employee's retaliatory discharge claim would be time-barred. JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.11[A], at 4-205 to -206 (2d ed. Supp. 2005-1).

Second, the Fourth Circuit's decision creates "an unprecedented oddity" in that while some employees will see their retaliation claims time-barred even before the act of discharge, for other employees, their claims will never be time-barred. *Graham County Soil & Water*, 367 F.3d at 260 (Wilkinson, J., dissenting) (Pet. App. 35a). A retaliatory discharge claim may occur even when there has been no violation of section 3729. S. REP. NO. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300 (although underlying violation of False Claims Act need not be shown to establish a retaliatory discharge action, "the actions of the employee must result from a 'good faith' belief that the violations exist").[2] Thus, under the rationale adopted by the Fourth Circuit, when an employee incorrectly (but in good faith) blows the whistle on his or her employer, any retaliatory discharge claim brought by that employee will never be time-barred. For such employees, the stop watch upon the

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[2] As the Seventh Circuit recently noted in *Fanslow v. Chicago Manufacturing Center, Inc.*, 384 F.3d 469 (7th Cir. 2004), whether an employee is engaged in protected activity under the False Claims Act entails both an objective and subjective component. Not only must the employee have a good faith belief that the employer is committing fraud against the government, the employee must show that a reasonable employee in the same or similar circumstances would hold the same belief. *Id.* at 479-80. Accordingly, while an actual substantive violation of section 3729 is not necessary to bring a retaliatory discharge action, there must be an objective and subjective potential that such a claim exists.

limitations period is never started because there has been no "violation of Section 3729."

Third, the Fourth Circuit's decision divorces the accrual of the limitations period from the elements of the cause of action. For well over a century, this Court has recognized that statutes of limitations begin to run when the last act that gives rise to the cause of action is complete. In *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875), this Court noted that "[a]ll statutes of limitation begin to run when the right of action is complete." In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997), this Court reaffirmed the well-established rule "that the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Id.* at 201 (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). As Judge Wilkinson stated in his dissent:

> The matter seems almost second-nature. Statutes of limitations for personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin to run on the date of the discharge. In an action challenging a wrongful act, the limitations period generally begins on the date of the act.

367 F3d. at 260 (Wilkinson, J., dissenting) (Pet. App. 31a).

Here, the Fourth Circuit has tied the limitations period to an event unrelated to the elements of the plaintiff's cause of action. By doing so, the Fourth Circuit ignores the well-established principle that a limitations period should not commence until the cause of action is complete and denies employees adequate notice of when they can bring a retaliation claim. Employees may not know, and may not be able to discover, when the violation of section 3729 occurred. Under every whistle-blower statute in this country, the limitations

period begins to run upon the act of the discharge or retaliation. The reason is simple – employees know immediately when they have been fired. The injury resulting from the retaliatory act is open and obvious.

The Fourth Circuit decision imposes upon the False Claims Act a framework for determining whether a retaliatory discharge claim is time-barred that is both illogical and inconsistent with congressional intent. Given the language of section 3731, the legislative history of the 1986 amendments and the bizarre outcomes that flow from tying the limitations period to anything other than the date of the retaliatory act, it is clear that Congress did not intend for a six year period set out in 31 U.S.C. § 3731(b) to apply to retaliatory discharge claims.

II. BECAUSE CONGRESS DID NOT PROVIDE FOR A LIMITATIONS PERIOD FOR AN ACTION UNDER 31 U.S.C. § 3730(h), FEDERAL COURTS SHOULD USE THE MOST CLOSELY ANALOGOUS STATE LIMITATIONS PERIOD.

When Congress has failed to supply an express statute of limitations for a federal cause of action, this Court has "generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law." *DelCostello v. Teamsters*, 462 U.S. 151, 158 (1983).[3] This Court has only deviated from this well-established general rule "when a rule from elsewhere in federal

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[3] In 1990, Congress enacted 28 U.S.C. § 1658. This statute provides that all civil actions created by Congress after December 1, 1990 shall be governed by a four year limitations period unless a more specific statute provides for a different period. *See Jones v. R. R. Donnelley & Sons Co.*, 124 S. Ct. 1836 (2004). Because a civil action for retaliatory discharge under the False Claims Act was created in 1986, 28 U.S.C. § 1658 is not applicable to a cause of action under 31 U.S.C. § 3730(h).

law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Id.* at 172. This exception to the general rule, however, is "narrow" and "closely circumscribed." *Reed,* 488 U.S. at 324. In *DelCostello*, this Court made clear that "in labor law or elsewhere," courts should rarely turn to a federal limitations period by analogy, and "resort to state law remains the norm for borrowing of limitations periods." 462 U.S. at 171.

Here, this Court should not deviate from this well-established rule. In *Reed*, this Court applied the most analogous state limitations period to a claim by a local union officer that the union had retaliated against the plaintiff in violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(2). As in *Reed,* applying state limitations periods would not "frustrate or significantly interfere with federal policies." 488 U.S. at 327.

Congress has failed to provide an express limitations period for a cause of action for retaliatory discharge under 31 U.S.C. § 3730(h). Accordingly, federal courts should use the most closely analogous state limitations period. Under North Carolina law, a cause of action for retaliatory discharge must be brought within three years of the retaliatory act. N.C. GEN. STAT. § 1-52.

CONCLUSION

The judgment of the court of appeals should be reversed.

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In The Supreme Court of the United States

GRAHAM COUNTY SOIL &
WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA
ex rel. KAREN T. WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Does the limitations period set forth in section 3731(b)(1) of the False Claims Act, which expressly applies to all civil actions "under section 3730," encompass a whistleblower's retaliation claim brought pursuant to section 3730(h), or do compelling reasons exist not to apply the plain language?

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STATEMENT OF THE CASE

On January 25, 2001, Karen Wilson filed in the district court a *qui tam* whistleblower action pursuant to the False Claims Act (31 U.S.C. § 3729 *et seq.*) ("FCA") alleging that the defendants submitted false claims for benefits under various federally funded agricultural programs in violation of the FCA. In her complaint, she also asserted an employment retaliation claim under section 3730(h) of the FCA, alleging that she was harassed for over a year by her employer and co-workers in retaliation for her whistleblower activities that culminated in her constructive discharge on March 7, 1997. (J.A. 25-30) Those acts of harassment included repeated criticism of her work without cause, obscene and hostile gestures, leaving a gun on her desk, threats to attack her violently and to kill her husband, threats to eliminate her position if she did not stop the federal investigation, and ostracism. (J.A. 25-30)

On May 30, 2002, the district court granted the defendant employer's Rule 12(b)(6) motion to dismiss the retaliation claim as time-barred. Rather than applying the six-year limitations period set forth in section 3731(b)(1) of the FCA, the district court applied the limitations period for the most closely analogous state-law cause of action, which it decided was the three-year period for North Carolina's wrongful discharge cause of action. Because the alleged date of Wilson's constructive discharge was over three years prior to her filing of the complaint, the district court concluded that the claim was time-barred and dismissed it. The district court granted Wilson the right to file an interlocutory appeal from its statute of limitations ruling, which she did.

Finding that the plain language of section 3731(b)(1) of the FCA controlled, the United States Court of Appeals for the Fourth Circuit reversed the district court and held that the six-year limitations period contained in that section applied to the Wilson's retaliation action. The defendant employer filed a petition for certiorari seeking a review of the Fourth Circuit's decision, which this Court granted.

SUMMARY OF THE ARGUMENT

The text of section 3731(b) of the FCA sets forth a six-year limitations period for "[a] civil action under section 3730" of the Act. Whistleblower retaliation actions, like Respondent's, are brought under paragraph (h) of section 3730. Thus, applying the plain meaning of the statute, the Courts of Appeals for the Fourth and Seventh Circuits properly have held that the six-year limitations period applies to whistleblower retaliation claims.

Petitioners make a weak attempt at arguing that "a civil action under section 3730" somehow does not include the retaliation action set forth in section 3730(h), and thereby does not provide an express limitations period. This effort to convince the Court that black actually is white is unavailing. Petitioners contend that the straightforward language is ambiguous by citing purported ambiguities in other parts of the FCA employing similar language. Their ambiguity argument fails because it does not demonstrate how those other possible ambiguities render the operative language in section 3731 ambiguous on the point at issue.

Because the language is plain, Petitioners in effect are contending that the Court should disregard the plain

language because it results in a limitations scheme that is unusual and that, in their view, leads to undesirable results. Petitioners apparently fail to characterize properly their main argument as one of disregarding the statute's plain language because the onerous hurdle that the argument would face. Courts are to deviate from the plain language only in the rare circumstances where it would lead to a truly absurd result, or where there is a clearly expressed legislative intent to the contrary. Neither is present here.

Petitioners' main absurdity argument is that it would make no sense for the six-year limitations period in section 3731(b)(1) to apply to a retaliation claim since, Petitioners argue, there is no connection between the retaliation claim and a "violation of section 3729," which is the trigger for the commencement of the limitations period set forth in (b)(1). This is simply false. As Judge Duncan pointed out in her masterful Fourth Circuit opinion below, there is a crucial nexus between the two C a retaliation claim under section 3730 requires an alleged violation of section 3729. Furthermore, the approach Congress adopted achieved a "simplicity of administration" by identifying a single, readily identifiable point at which to begin the limitations periods for all actions under section 3730.

Petitioners' second absurdity argument can be easily dismissed. Petitioners suggest that because a tolling provision in section 3731(b)(2) does not apply to retaliation claims, then it is absurd to apply the six-year limitations period in section 3731(b)(1). However, Petitioners give no reason as to why the application of section 3731(b)(1) is dependent on the applicability of section 3731(b)(2). It is not, and courts are unanimous in implicitly rejecting this argument by applying (b)(1) to certain *qui tam* actions

even though some of those courts have held that (b)(2) is not applicable to them.

In an attempt to buttress their absurdity arguments, Petitioners offer a couple of contrived hypotheticals and then claim that the results would be absurd under the plain language of section 3731. Petitioners apparently could not find a single case in which either of the two scenarios has ever arisen since the FCA was amended in 1986, almost nineteen years ago, and neither rises to the level of absurdity required to avoid the statute's plain language.

Petitioners also seek to have the Court disregard the plain language of section 3731 by claiming that it is inconsistent with the legislative history. However, none of the history that Petitioners cite directly addresses the issue. Rather, Petitioners offer selective snippets of Congressional history from which inferences could be drawn opposite of what Petitioners seek to have the Court draw. Further, Petitioners fail to explain away the legislative history cited by the Fourth Circuit below that supports the conclusion that Congress intended what the plain language says. In short, Petitioners' proffered legislative history falls far short of the "clearly expressed" legislative intent necessary to justify a disregard of the plain language of the statute.

Even if the statutory language were ambiguous, and it is not, this Court has previously recognized that there is a presumption of resolving an ambiguity in favor of including the federal claim within the scope of the federal limitations period as opposed to concluding that the claim has been given no federal limitations period. This presumption has been reinforced by the passage in 1990 of a federal "catch-all" limitations period of four years.

Furthermore, this Court has directed that the limitations period of the most closely analogous state cause of action is not to be used where, as is true here, it would interfere significantly with the purpose of the federal statute. Also, when it is a practical necessity to bring two federal claims together, and if one of them has an express federal statutory limitations period while the other does not, that federal statutory period, rather than a state law limitations period, should also be applied to the other claim. Here, the practical necessities that often require that the retaliation claim be brought with the underlying *qui tam* claim weigh in favor of applying the six-year statutory limitations period to the retaliation claim.

Finally, the use of the limitations period of the "most closely analogous" state law would impose the onerous burden on the whistleblower of making an often difficult analysis of which statute would apply, which would be compounded by a complex choice of law analysis. Such additional burdens on the whistleblower undercut one of the key purposes of the 1986 Amendments to the FCA – to increase the incentives to the whistleblower to file a *qui tam* claim – by serving to discourage her from doing so.

Accordingly, the Court should affirm the Fourth Circuit's reversal of the district court's decision to grant a 12(b)(6) motion to dismiss whistleblower Wilson's retaliation claim on statute of limitations grounds, and hold that the six-year limitations period set forth in section 3731(b)(1) of the FCA does apply to retaliation claims brought under section 3730(h).

ARGUMENT

I. The Six-Year Limitations Period Set Forth In Section 3731(b)(1) Of The FCA By Its Plain Terms Applies To Whistleblowers' Retaliation Actions.

A. Under The Plain Meaning Of Section 3731 Of The Act, The Scope Of Its Limitations Period Includes Retaliation Claims.

Section 3731(b) of the FCA provides, in pertinent part, that

> [a] civil action under section 3730 may not be brought – –
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed. . . .

31 U.S.C. § 3731(b). Retaliation actions are brought pursuant to paragraph (h) of section 3730. Thus, a retaliation action is a "civil action under section 3730." Accordingly, applying the language of section 3731(b)(1) as it is written, the scope of the six-year limitations period contained therein includes retaliation claims. Section 3729 establishes the liability for presenting a false claim to the Government. "Hence, the effect of the language as written is to provide that an action under § 3730, which necessarily includes an action for retaliation under § 3730(h), may be brought no more than six years after the date on which the underlying violation was committed." *United States ex rel. Wilson v. Graham Cty. Soil & Water Conserv. Distr.*, 367 F.3d 245, 248 (4th Cir. 2004).

Where, as is true here, "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters*, 489

U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Both the Fourth Circuit below and the Seventh Circuit have properly concluded that, applying its plain language, section 3731 requires that the six-year limitations period be applied to retaliation actions. *See Wilson*, 367 F.3d at 251 (4th Cir. 2004); *Neal v. Honeywell*, 33 F.3d 860, 865 (7th Cir. 1994).[1] As Judge Easterbrook reasoned:

> Is the suit under § 3730(h) timely? Section 3731(b)(1) allows six years to file suit under § 3730 from "the date on which the violation of § 3729 is committed". Section 3729 deals with making false claims. Neal filed this suit under § 3730 within six years of Honeywell's false claims. It is therefore timely.

33 F.3d at 865.

B. Contrary To Petitioners' Attempts, Ambiguity Is Not An Issue Here.

Making an argument that neither the Ninth Circuit decision in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), nor the dissenter to the Fourth Circuit decision below made, Petitioners claim that "a civil action under section 3730" in section 3731(b) is not plain, but rather is ambiguous with respect to whether or not the phrase includes all three actions authorized by section 3730: 1) § 3730(a) – action brought by Attorney

[1] The only other appellate decision to address the issue did not dispute that, under a plain reading of section 3731, retaliation claims are subject to the six-year limitations period; rather, it based its ruling on the suggestion that the application of the plain meaning would lead to absurd results contrary to the legislative history. *See Lujan*.

General; 2) § 3730(b) – *qui tam* action; and 3) § 3730(h) – retaliation action. (Pet. Br. 14) However, it is clear that the substance of Petitioners' arguments do not raise the issue of ambiguity. Ambiguity is present only when there is a question as to the meaning of what Congress said. Here, there is no dispute that a retaliation claim is a "civil action under section 3730." Thus, there is no question as to the meaning of what Congress said in section 3731(b) – a retaliation claim is included in the scope of the limitations period set forth therein. As discussed further in Part II below, what Petitioners are really contending is that Congress did not mean to say what it did.

In support of their ambiguity argument, Petitioners attempt to raise issues as to whether Congress really meant what it said when it used phrases similar to "a civil action under section 3730" elsewhere in the FCA. However, this merely begs the question as to how these purported issues with respect to similar phrases elsewhere in the FCA render the phrase "a civil action under section 3730" ambiguous *as it is used in section 3731(b).* It doesn't. *Cf., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("The plain meaning of [subsection in issue] cannot be altered by the use of a somewhat different term in another part of the statute"). That phrase as used in section 3731(b) is clear and unambiguous. *Wilson,* 367 F.3d at 250-51.

Furthermore, if Congress had meant to limit the scope of section 3731 to only actions brought by the Attorney General under section 3730(a) and *qui tam* actions under section 3730(b), it easily could have drafted the language to accomplish this. As the Fourth Circuit pointed out below, "[s]*ection 3731(b) could* have provided that a 'civil action under *section 3730(a) or (b)* may not be brought more than

six years from the date the violation of *§ 3729* is committed.' This Congress did not do." *Id.* However, elsewhere in the FCA, Congress demonstrated that it knows how to limit the applicability of a section to particular subsections in that manner if it so intends. For instance, section 3731(d) reads "any action under subsection (a) or (b) of section 3730." This is precisely what Congress would have written in section 3731(b) if it intended to exclude retaliation claims from the section's ambit – but it did not.

In any case, the court's function in interpreting a statute is "to determine whether the *language at issue* has a plain and unambiguous meaning with regard to *the particular issue in the case.*" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (emphasis added). Petitioners' citations to other language in the FCA dealing with other issues does not assist in this determination. As demonstrated above, the language in section 3731(b) is plain and unambiguous on the issue in question and ambiguity is simply not an issue here.

II. None Of The Rare Exceptions To The Court's Duty To Enforce The Plain Meaning Of Section 3731 Of The FCA Apply Here.

While Petitioners make a half-hearted (and failing) attempt to argue that section 3731 of the FCA is ambiguous, their real argument is that the Court should disregard the plain meaning of section 3731 because, in their view, it does not make sense and leads to undesirable results, and Congress did not really mean what it said. It is not surprising that Petitioners fail to characterize properly their main arguments, since, properly characterized, the arguments face a formidable hurdle. A necessary consequence of the Constitutional principle of the separation of powers is that

a court is forbidden from substituting its own "pleasure to that of the legislative body," *The Federalist* No. 78, 469 (C. Rossiter ed. 1961) (A. Hamilton). Accordingly, courts are bound by the plain language of a statute. They are to deviate from that plain language only in the rare circumstances where there is "a clearly expressed legislative intent to the contrary," *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993), or its literal application would lead to an absurd result, *United States v. American Trucking Ass'ns*, 310 U.S. 534 (1940). Neither of those rare exceptions comes close to applying here.

A. A Straightforward Application Of The Limitations Period In Section 3731 To Retaliation Actions Does Not, As Petitioners Claim, Lead To An Absurd Result.

A "narrow exception," *Public Citizen v. Department of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring), to the enforcement of the plain language of a statute exists when its application would result in "patently absurd consequences," *United States v. Brown*, 333 U.S. 18, 27 (1948), that "Congress could not possibly have intended," *FBI v. Abramson*, 456 U.S. 615, 640 (1982) (O'Conner, J., dissenting). In its exercise of the narrow exception, the Court must act "with self-discipline by limiting the exception to situations where the result of applying the plain language would be, in a genuine sense, absurd, i.e., where it is quite impossible that Congress could have intended the result, and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen*, 491 U.S. at 470-71 (Kennedy, J., concurring). Petitioners' absurdity arguments fall far short of that standard.

1. Petitioners' Suggestion That The Plain Language Of 3731 Results In An Absurdity Because There Purportedly Is No Link Between A Violation Of Section 3729 And A Retaliation Action Is Simply Wrong.

Petitioners' main "absurd results" argument is the suggestion that it would be absurd to apply the plain language of section 3731 to a retaliation claim since, Petitioners argue, there purportedly is no logical connection between a retaliation claim and a "violation of section 3729," which triggers the six-year limitation period under section 3731(b)(1). This is demonstrably false. There is a crucial nexus between a retaliation claim and a violation of section 3729: a retaliation claim, like any claim under section 3730, requires an alleged violation of section 3729. As Judge Duncan explained in the Fourth Circuit's majority opinion:

> § 3730(h) subsumes a violation of § 3729, even if it does not do so explicitly. By its terms, § 3730(h) protects any "lawful acts done by the employee on behalf of the employee or others *in furtherance of an action under this section*." *Id.* (emphasis added). Because an action under § 3730 will not lie absent an alleged violation of § 3729, it is clear that Congress has elected to identify a single, readily identifiable point at which to begin the limitations periods for all actions under § 3730. *See Neal*, 33 F.3d at 865. (noting the "simplicity of administration" afforded by the approach codified in § 3731(b)(1)).
>
> * * *
>
> If an employee's termination is "independent" of a violation of § 3729 and the employee's decision

> to report it, at the very least it would not be retaliatory. Alternatively, if the termination could fairly be described as "retaliatory," but could not be tied to the reporting of a violation of § 3729, it would be actionable not under the FCA and § 3730(h) but under Title VII or some other statute prohibiting employment discrimination. The events that trigger the statute of limitations may precede the final event that gives rise to an action for retaliation [reference omitted], but that fact does not render the events "independent" of one another.

Wilson, 367 F.3d at 251 & n.7.

Accordingly, the premise upon which this "absurd results" argument relies, that there is no relationship between a retaliation claim and the underlying false claims violation, or as Judge Wilkinson put it in his dissenting opinion below, that the two are "independent," *see Wilson*, 367 F.3d at 258, is simply false.

The essence of the Petitioners' criticism of section 3731(b) is that it "is a departure from the limitations periods generally applicable to claims of retaliation," *Wilson*, 367 F.3d at 252, n.10, and is one that Petitioners (and their federal contractor business association amici) do not prefer and would not have selected.

> Nevertheless, when Congress's intent to endorse the benefits and consequences of one statutory scheme over another is clear from the text of the statute, as we conclude it is here, "the wisdom of Congress' action . . . is not within our province to second guess." *Eldred v. Ashcroft*, 537 U.S. 186, 222, 154 L.Ed. 683, 123 S.Ct. 769 (2003).

367 F.3d at 252, n.10. Therefore, this Court should reject Petitioners' invitation to second guess Congress' scheme for dealing with the unique concerns and procedural issues generated by the FCA, and apply section 3731 as it is written.

2. Contrary To Petitioners' Argument, The Applicability Of Section 3731(b)(1) To Retaliation Claims Is Unaffected By Whether The Tolling Provision In Section 3731(b)(2) Also Applies.

In their second "absurdity" argument, Petitioners suggest that, because the tolling provision in section 3731(b)(2) appears not to apply to retaliation claims since (b)(2) refers to an "official of the United States charged with responsibility to act" and there is none in a retaliation claim, the application of the six-year limitations period in (b)(1) to retaliation claims is thereby rendered an absurdity. This argument suffers from the basic logical error of concluding that just because one subpart of a provision does not apply, then none of the subparts can apply.[2] Petitioners fail to state a reason why (b)(1) could not apply to a retaliation claim, even if (b)(2) might not – the two subparts are not logically dependent upon each other. In fact, courts are unanimous that the six-year limitations period in (b)(1) applies to a *qui tam* action in which the government has not intervened, even though courts are divided on the issue of whether (b)(2) applies to such an action. *Compare United States ex rel. Thistlethwaite v. Dowty Woodsville Polymer, Ltd.*, 6 F.Supp.2d 263 (S.D.

[2] Indeed, the two subsections are separated by the conjunction "or," so that both subsections cannot apply.

N.Y. 1998) (holding that the six-year limitation period in (b)(1) applies, while the tolling provision in (b)(2) does not) *with United States ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1214-16 (9th Cir. 1996) (both (b)(1) and (b)(2) apply). Thus, both logic and case law preclude Petitioners' argument.

3. Petitioners' Extreme Hypotheticals Do Not Constitute Absurdity That Would Justify Deviating From The Plain Language Of Section 3731.

Petitioners finally attempt to buttress their absurdity argument by setting forth a couple of contrived and unlikely hypotheticals involving the application of the limitations period in section 3731 to a retaliation claim, and then suggesting that the results are so unacceptably absurd that the Court should disregard the plain meaning of the statutory provision.

The Court in *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460-61 (1892), set forth examples of true absurdity: (1) where a sheriff is prosecuted for obstructing the mails even though he was executing a warrant to arrest the mail carrier for murder; (2) where a medieval law against drawing blood in the streets is applied against a physician who came to the aid of a man who had fallen down in a fit. *Public Citizen*, 491 U.S. at 470-71.

In light of this intentionally-high threshold, the Petitioners' attempt to fit this statute into the narrow exception falls well short. Indeed, Petitioners have set forth two extreme scenarios for which they contend an application of the plain language of section 3731(b) creates

an "illogical and unmanageable scheme." (Pet. Br. 22). The reality, however, is far less dramatic.

The first hypothetical is that in some extreme situations the limitations period could run before the employee is discharged or discriminated against. As Judge Easterbrook observed in *Neal*, 33 F.3d at 865, that possibility does not render the scheme absurd since some statutes, statutes of repose, are designed to do exactly that – bar certain claims before they even arise. And if the employer deliberately waited out the six-year period until it retaliated, the federal doctrines of equitable tolling or estoppel are potentially available. *Id.* Further, any retaliatory conduct likely will occur close in time to the actions protected by section 3730(h). *See id.* at 865-66. As the Fourth Circuit observed:

> As a result, there would be few instances in which several years would pass between the violation, the protected conduct, and the retaliatory act. Additionally, the length of the limitations period in § 3731(b)(1) lessens the likelihood that the purportedly absurd consequences advanced by the [Petitioners] would occur. Moreover the six years provided from the date of the violation should be sufficient to encompass the protected act and the retaliation, lest they both face challenges for attenuation and staleness.

Wilson, 367 F.3d at 253.

The second hypothetical supposes a scenario wherein a retaliation claim is brought for which no underlying violation of section 3729 has actually occurred, i.e., an employee has incorrectly "blown the whistle." Petitioners contend that in this scenario the limitations period set forth in section 3731(b)(1) would never begin to run. (Pet.

Br. 23-24). However, this is based on a construction that is incompatible with the broader context of the FCA. *See Wilson*, 367 F.3d at 254-55. As Petitioners point out, in order to engage in activity protected by section 3730(h), an employee must have an objective good-faith basis that a false claim occurred. (Pet. Br. 23, n.2 (*citing Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469 (7th Cir. 2004)). Although this issue has apparently not yet been adjudicated (which demonstrates the improbability of it occurring), it is a reasonable position that in this circumstance the limitations period should run from the time that the alleged violation of section 3729 was believed by the employee to have occurred (even if it ultimately turned out not to be an actual violation) given that the retaliation claim is based on that same alleged violation. Thus, Petitioners' proffered absurdity is based on the unlikely assumption that this issue would be adjudicated differently in a situation that apparently has never arisen. Thus, this scenario also does not rise to the level of absurdity required to avoid the plain language of the statute.

The scenarios proffered by Petitioners are extreme cases. Although nearly twenty years have passed since the 1986 Amendments to the FCA, Petitioners cited no cases wherein the alleged absurd scenarios actually occurred in the real world. Certainly in this case, as in the other reported cases, application of the plain language does not lead to an absurd result. Further, such scenarios can be conjured up with respect to the plain language of many statutes, but this alone does not merit the disregard of that language. "[S]trange problems and questions may arise in the application of the plain meaning of many statutes under particular sets of facts. Still, the task of this Court is not to answer every conceivable question or

hypothetical about a statute." *Grand ex rel. United States v. Northrop Corp.*, 811 F.Supp. 333, 336 (S.D. Ohio 1986) (citations omitted). Rather, it is to analyze the statutory language at issue "with regard to the particular dispute in the case," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Accordingly, the Petitioners fail to clear the high hurdle of demonstrating that applying the plain language of section 3731(b)(1) to retaliation actions would produce "patently absurd consequences."

B. Petitioners' Reliance On Legislative History To Disregard The Plain Language of Section 3731 Is Misplaced.

In order to disregard the plain reading of a statute based on the legislative history, there must be "a clearly expressed legislative intent to the contrary," *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993). Despite Petitioners' efforts to show otherwise, there is no "clearly expressed legislative intent" in the legislative history contrary to the plain meaning of section 3731(b) of the FCA.

All that Petitioners are able to offer are a few selective snippets from the legislative history that do not address directly the statute of limitations period for retaliation actions. Rather, the Petitioners seek to have the Court draw inferences from those snippets that are favorable to its position, when one can draw opposite inferences that are more reasonable.

Petitioners first cite the statement that Congress, in forming the whistleblower protections in the 1986 False Claims Act Amendments to the FCA, "was guided by the

whistleblower protection provisions found in Federal safety and environmental statutes including [eight such statutes]." (Pet. Br. 15). Noting that those eight statutes have very short express periods of limitations for the whistleblower claims, Petitioners contend that one should infer from this that Congress did not intend for the FCA retaliation claim to have a longer six-year limitations period. However, one could just as reasonably infer from that statement that Congress was guided by the other eight whistleblower statutes in setting forth an express and uniform limitations period for the FCA retaliation claim (the six-year limitation in section 3731), as it did for those eight other types of whistleblower claims, rather than failing to provide a limitations period for it.

Citing *Lujan*, 162 F.3d 1027 (9th Cir. 1998), Petitioners point to the amendment of section 3732(b) that replaced "violation" with a "violation of section 3729" and then ask the Court to guess from that change that Congress did not intend for the limitations period to include retaliation actions. However, Petitioners and the Ninth Circuit in *Lujan* have simply ignored, rather than successfully refuting, Judge Easterbrook's observation in *Neal*, 33 F.3d 860, 865 (7th Cir. 1994), that a better explanation (or at least a viable one) is that "Congress [] opted for simplicity of administration" in giving the *qui tam* and retaliation claims the same limitations period beginning with the section 3729 violation since it is often "easier to determine the date of a false claim than to pin down the time of the retaliatory acts." *Id.* In fact, this additional language left no doubt that Congress intended the false claim to trigger all limitations periods because the word "violation" alone may have been unclear as to the trigger for retaliation claims. Thus, Petitioners' speculation as to the intent

behind Congress' wording changes to the statute fall far short of the evidence of "clearly expressed legislative intent" necessary to disregard the plain meaning of a statute. *See Reves*, 507 U.S. at 177. Accordingly, the Court should reject petitioners' argument on this point.

Petitioners' other two cites to the legislative history – the brief comments in the Senate Report and in the Congressional Record by Congressman Fish – as to how the modification of the limitations period provisions would protect the Government, also fall far short of showing a clear Congressional intent with respect to the applicability of the period to the retaliation claim. Petitioner seeks to have the Court make inferences from their silence as to the retaliation claim. However, one may make the more reasonable assumption that the intent of those comments was merely to highlight how the new tolling period would protect the Government, rather than to present an exhaustive exposition as to functioning and applicability of the limitations period for each of the three actions set forth in section 3730. In any case, no *clear* legislative intent on this point can be gleaned from these statements.

In sum, Petitioners' arguments that the legislative history shows Congressional intent that the retaliation claim not be subject to the six-year limitations period rely on conjecture and unwarranted inferences. They are unpersuasive, and in any case, fall far short of showing a clearly expressed Congressional intent sufficient to justify the Court disregarding the plain language of section 3731(b).

III. In Any Event, Any Ambiguity In The Scope of The FCA's Statutory Limitations Period Should Be Resolved In Favor Of Applying It To The Retaliation Claim.

A. The Legislative History Reinforces The Conclusion That Section 3732(b)(1) Applies To Retaliation Actions.

As the Fourth Circuit demonstrated in great detail, "[e]ven if it were unclear whether Congress intended the language of § 3731(b)(1) to apply to actions under § 3730(h), the review of the legislative history required by that ambiguity reinforces the conclusion that the section applies to retaliation claims under the FCA." *Wilson,* 367 F.3d at 252. In discussing the provisions created by the 1986 amendments, the Senate bill proposed "a new section 3734" containing the retaliation action. *See* S. Rep. at 34, *reprinted in* 1986 U.S.C.C.A.N. at 5299. However, no such section was ultimately added to the FCA. Instead, the retaliation provision was placed in section 3730 as subparagraph (h). Had the retaliation provision been added to the FCA as a separate section, rather than as a subparagraph to 3730, then it would not have been a "civil action under 3730" and therefore would not have been subject to the limitations provision in section 3731. "Hence, Congress's relocation of the retaliation provision to § 3730 reinforces the conclusion that Congress intended the six-year limitations provision of § 3731(b)(1) to apply." *Wilson*, 367 F.3d at 252; *see also Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

Petitioners go to great lengths in an attempt to convince the Court that it should draw from this legislative history a conclusion opposite of the one drawn by the Fourth Circuit. (Pet. Br. 18-21). In support of their argument, they cite brief comments in a Senate Report and in the Congressional Record made by Congressman Fish that highlight the addition of the tolling provision of section 3731(b)(2) to the FCA to protect the Government's interests. This contributes nothing to the analysis since the tolling provision is not at issue and no one is asserting that it applies to the retaliation claim. Given their focus on the addition of the tolling provision in (b)(2), the comments' silence as to the applicability of the six-year limitations period in (b)(1) to retaliation actions does not carry the weight that Petitioners contend it does, and fails to alter the persuasive force of the Fourth Circuit's analysis on this point.

B. Even If An Ambiguity Existed In Section 3731, It Should Be Resolved In Favor Of Including Within Its Scope The Retaliation Action.

Even if the scope of the limitations period set forth in the Act were arguably ambiguous on the issue of whether it included the retaliation claim, that ambiguity should be resolved in favor of inclusion as opposed to the retaliation claim having no federal statutory limitation period. *See Adams v. Wood*, 6 U.S. 336, 342 (1805) (cited by Justice Scalia on this point in *Agency Holding Corp. v. Malley-Duff & Assoc.*, 483 U.S. 143, 170 n.5 (1987) (Scalia, J., concurring)).

The propriety of this rule appears to be reinforced by the enactment in 1990 of 28 U.S.C. § 1658. That statute provides for a four-year limitations period for civil actions created after its enactment in 1990 unless a more specific period is provided. Although the law is not retroactive and would not change the rule that federal actions created prior to 1990 that do not have a federal statutory limitations period should usually incorporate the various state law limitations periods, it does demonstrate Congress' dissatisfaction with the resort to the "hodge podge" of state limitation periods and gives new impetus to the rule in *Adams* that any ambiguity as to the applicability of federal statutory limitation period should be resolved in favor of applying the limitation period to the cause of action.

IV. In Any Case, The Various State Limitations Periods Should Not Be Used Where, As Is True Here, They Would Be At Odds With The Effective Operation Of The FCA And Effectively Diminish The Limitations Period For *Qui Tam* Claims.

A. Using The Various State Limitations Periods Would Effectively Diminish The Limitations Period For *Qui Tam* Claims.

Given that the statutory provision in question C section 3731(b)(1) of the FCA, clearly and unambiguously applies to retaliation claims, the inquiry need not go further. However, even if that provision did not expressly apply to retaliation claims, the limitations period for the most closely analogous state cause of action should not be applied if it is at odds with the purpose or operation of the federal law, *see North Star Steel Co. v. Thomas*, 515 U.S.

29, 34 (1995), as its application would be here. Even the Supreme Court case relied upon by the Ninth Circuit in *Lujan* makes this clear. *See Reed v. United Transp. Union*, 488 U.S. 319, 327 (1989) (state limitations periods should not be used if "they frustrate or significantly interfere with federal policies").

Congress intended for the False Claims Act to unleash a "'posse of ad hoc deputies [like whistleblower Wilson] to uncover and prosecute frauds against the government.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 (4th Cir. 1999) (citation omitted). "Because Congress was concerned about pervasive fraud in 'all Government programs,'" by its 1986 amendments to the FCA, Congress "enhanced the incentives for relators [whistleblowers] to bring suit," *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 133 (2003), including making retaliation against the whistleblower an actionable claim. However, since in most cases the false claims and retaliation "will occur close in time," *Neal*, 33 F.3d at 865, whistleblowers would be stripped of recourse for their retaliation injuries long before the six-year statute ran on the corresponding *qui tam* claim if the state limitations periods (e.g., Tennessee, New York and California (1 year)), were applied to the retaliation claim.

In the absence of a remedy for the harms they suffered from the retaliation, many potential whistleblowers will be deterred from bringing *qui tam* cases, thereby frustrating the Congressional policy of encouraging those suits and the resulting recoveries to the federal treasury. Using the state law limitations period for retaliation claims would thus have the practical effect of shortening the six-year limitations period for those *qui tam* claims, a result that is at odds with the important Congressional

policy that *qui tam* actions have a six-year limitations period, and is therefore unacceptable. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958) (using the shorter state law limitations period for one federal cause of action where the practicalities require that it be brought with another federal action with a longer federal statutory limitations period "effectively diminishes the time within which the [plaintiff] must commence his [other cause of action]," which is unacceptable); *North Star Steel*, 515 U.S. at 29; *Reed*, 488 U.S. at 327.

This conclusion is reinforced by the fact that since *qui tam* and retaliation claims are interrelated, and it is usually a practical necessity to bring the two claims together, the two claims should have the same statutory limitations period even if the retaliation claim would not otherwise have an applicable federal statutory limitations period. *See McAllister*, 357 U.S. at 225-26 (1958) (where "practical necessity" usually requires that two federal claims be brought together, but one claim has an express federal limitations period while the other does not, that practical necessity mandates that the other claim have the same limitations period rather than one based on state law).

B. Determining The Appropriate State Law Presents Unwanted Difficulties.

A clear objective of Congress in amending the FCA in 1986 was to "enhance[ ] the incentives for relators to bring suit." *Cook County*, 538 U.S. 119, 133 (2003). Congress's decision to use the same six-year limitations period scheme for all claims brought under FCA, which the Seventh Circuit in *Neal* suggested was motivated by desire

for "simplicity of administration," also has the effect of simplifying the crucial legal task of the relator in determining the limitations period for his *qui tam* and retaliation claims, thus enhancing his incentives to bring suit.

1. Determining The "Most Analogous" Statute To Her Retaliation Claim Would Present Unnecessary Difficulties For The Employee And The Court.

Petitioners simply ignore the compelling reasoning set forth in the majority opinion of the Fourth Circuit as to why Congress opted for the simplicity of administration of its scheme rather than a "hodge podge" of state limitations periods. The difficulties in determining which statute of a state is most analogous "would further undermine the protection afforded by § 3730(h)." *Wilson*, 367 F.3d at 256. Indeed, in this case the decision by the district court to apply North Carolina's statute relating to wrongful discharge might be obvious as to the wrongful discharge claim, but is dubious with respect to Relator Wilson's claims of retaliation and intimidation.[3] *See Owens v. Okure*, 488 U.S. 235, 241 (1989) (noting difficulty in ascertaining most analogous statute in states with multiple statutes of limitation for personal injury actions). Further, the collateral litigation required to resolve the issue "would exacerbate any uncertainty as to the time

[3] Petitioners' assertion that "the act of discharge or retaliation is open and obvious to all," (Pet. Br. 11), is simply not true. While a discharge normally is obvious, other acts of retaliation, which are covered by section 3730(h), are often concealed or disguised by the retaliator and difficult to uncover and trace – similar to fraud. *See, Neal*, 33 F.3d at 865 (often "easier to determine the date of a false claim than to pin down the time of the retaliatory acts").

available for filing a retaliation claim, and thereby reduce the employee's incentive to report a violation of § 3729." *Wilson*, 367 F.3d at 256.

2. Complex Choice Of Law Issues Would Arise.

Moreover, under Petitioners' proposed rule, choice of law issues could be more puzzling than a Rubik's Cube for an employee deciding whether to blow the whistle on fraud (and for a court adjudicating the issue).

> Reference to state statutes of limitations may require district courts to address choice of law issues in determining which state's law it must look to before selecting the appropriate state statute. Cf. [*United States ex rel.*] *Ackley* [*v. IBM*], 110 F.Supp.2d at 402-03 & n.7 (disagreeing with defendant's argument that Maryland's *lex loci delicti* choice-of-law rule applied and required recourse to New York's one-year limitations period, and collecting cases for and against proposition that the most analogous statute is to be identified from the forum state's code, rather than following an application of the forum state's choice-of-law rules).

Wilson, 367 F.3d at 256. As evidenced by the discussion of the district court in *Ackley*, these difficulties are far from hypothetical, but have arisen, and will arise with increasing frequency, under Petitioners' proposal. If state law limitations periods were to be used, relator's counsel could be forced into considering a forum-shopping analysis, with the possibility that the retaliation and *qui tam* claims are ultimately brought in places with little relation to where the false claims occurred, or not brought at all where

relator or her counsel conclude that the risks and complexities of being wrong on this issue outweigh other considerations.

CONCLUSION

Based on the foregoing, whistleblower Wilson respectfully requests that the Court affirm the decision of the Court of Appeals reversing the order of the district court dismissing Wilson's retaliation claim on statute of limitations grounds with the instruction that the district court apply the six-year limitations period set forth in section 3731(b)(1) of the FCA.

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IN THE

Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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ARGUMENT

Congress did not provide a statute of limitations for retaliation claims in the False Claims Act. Neither the specific language of 31 U.S.C. § 3731(b) nor the policy arguments made by Respondent supports the conclusion that section 3731(b) applies to retaliation actions brought under 31 U.S.C. § 3730(h).

I. CONGRESS DID NOT INTEND TO DEVIATE FROM THE BASIC RULE THAT A STATUTE OF LIMITATIONS RUNS FROM THE ELEMENTS OF THE CAUSE OF ACTION.

Under Respondent's construction of section 3731(b), the limitations period for a retaliation claim commences not on the date of the employee's injury but instead on the date the employer submits a false claim to the government. Thus, under Respondent's construction, the limitations period for retaliation claims is tied to violations of section 3729 rather than violations of 3730(h). This position defies logic and permits the absurd result that retaliation claims of some employees will be barred before the basis for their cause of action occurs, while retaliation claims of other employees will never have a starting date.

Statutes of limitations are tied to the elements of the cause of action; they normally commence when the cause of action is complete. *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) ("All statutes of limitation begin to run when the right of action is complete . . . ."); *accord Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997); *United States v. Lindsay*, 346 U.S. 568, 569 (1954); *Rawlings v. Ray*, 312 U.S. 96, 98 (1941). This Court has applied this fundamental principle time and again. Of course, Congress can vary from this norm if it so chooses. If

Congress intended to do so in the False Claims Act, it would have done so clearly and explicitly in the language of section 3731(b).

As this Court noted in *Reiter v. Cooper*, 507 U.S. 258, 267 (1993), "[w]hile it is theoretically possible for a statute to create a cause of action that accrues at one time for purposes of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute." Congress simply did not intend to create such an oddity with respect to a retaliatory discharge action under section 3730(h).

The validity of this concept was reiterated in the recent decision of *Johnson v. United States*, 544 U.S. ___, 2005 U.S. LEXIS 2934 (Apr. 4, 2005). In *Johnson*, this Court addressed when the one year limitations period under 28 U.S.C. § 2255 for bringing an action attacking a federal sentencing enhancement runs where a state court judgment that forms the basis for that enhancement is subsequently vacated. The United States argued that the one year limitation period should run from the date the inmate possesses facts that would allow him to challenge the validity of the state conviction. In rejecting the Government's argument, this Court noted that under the Government's advocated interpretation, the "statute of limitations may begin to run (and may even expire) before the § 2255 claim and its necessary predicate even exist." Slip op. at 8. Relying upon the principle that "statutes of limitations ordinarily do not begin to run until a plaintiff's complete cause of action has accrued," this Court concluded that it was "highly doubtful" that Congress intended to start the limitations period running upon the occurrence of events that precede the necessary elements of the claim. *Id.* at 9. As in *Johnson*, it is highly doubtful that Congress intended to create a limitations period governing retaliatory discharge actions that runs before the necessary predicates of that claim even exist.

II. CONGRESS DID NOT INTEND THAT THE FALSE CLAIMS ACT WOULD EXPOSE EMPLOYERS TO SIGNIFICANT BACKPAY LIABILITY AS A RESULT OF STALE CLAIMS.

Under the Government's reading of section 3731(b), an employer could be faced with 40 years of backpay by the time a retaliatory discharge action is tried. The United States contends that under certain circumstances an employee may wait 10 years to file a retaliatory discharge action. (U.S. Br., pp. 18-19 n.6) Given the fact that cases abound in which the United States has caused a complaint to remain under seal for over five years, *see, e.g., United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp. 2d 939, 944 n.7 (N.D. Ill. 2004) (complaint under seal for seven years), and given that many of those cases take at least five additional years to wind their way through the court system, under the Government's interpretation of section 3731(b), an employer could see a 20 year lag from the date of discharge to final judgment. In such a case, the employee could seek to recover as much as 40 years of backpay.[1]

No other statute enacted by Congress allows an employee to recover such a windfall. *See* Pet. Br., p. 16 n.1 (listing limitations periods for federal whistleblower statutes). Neither Respondent nor the United States has cited to a single statute that even remotely approaches the amount of backpay

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[1] Although an employee who brings an action under section 3730(h) has a duty to mitigate damages, federal courts are split as to whether any mitigation should be subtracted before or after the doubling of damages. *Compare Neal v. Honeywell, Inc.*, 995 F. Supp. 889, 896 (N.D. Ill. 1998) (doubling of backpay before subtracting mitigation), *aff'd*, 33 F.3d 860 (7th Cir. 1994) *with Wilkins v. St. Louis Hous. Auth.*, 314 F.3d 927, 934 (8th Cir. 2002) (mitigation should be subtracted before doubling).

that their construction of the False Claims Act would authorize.[2]

Not only does the statutory interpretation espoused by Respondent subject employers to paying a windfall to employees, employers will be helpless to defend against the employee's allegations due to the loss of witnesses and documents over such a long time. This Court should not construe the False Claims Act to allow a windfall of 40 years of backpay.

III. CONGRESS DID NOT INTEND FOR THE LIMITATIONS PERIOD OF 31 U.S.C. § 3731(b) TO APPLY TO RETALIATION ACTIONS.

A. The limitations period of section 3731(b) is only applicable to claims that are based upon a "violation of section 3729."

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[2] The United States urges this Court to ignore whistleblower statutes in which Congress has imposed limitations periods far shorter than the 10 year limitations period, arguing that because those statutes provide for an administrative remedy, a shorter limitations period is justified. (U.S. Br., p. 25 & n.10) Not all whistleblower statutes contain an administrative remedy. *See* Fed. Deposit Ins. Act, 12 U.S.C. § 1831j (2000) (two year period); Fed. Credit Union Act, 12 U.S.C. § 1790b(b) (2000) (two year period); Fed. Home Loan Bank Act, 12 U.S.C. § 1441a(q)(2) (2000) (two year period).

Citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 36 (1995), the United States further argues that "six years . . . is not long enough to frustrate the interest in a 'relatively rapid disposition of labor disputes.'" (U.S. Br., p. 27 n.13) The statute at issue in *North Star Steel Co.* (the Worker Adjustment and Notification Act, 29 U.S.C. § 2101 *et seq.*), however, caps the recovery of backpay at 60 days of salary. 29 U.S.C. § 2104(a) (2000). An award of backpay consisting of 60 days of salary is dramatically different from an award of 40 years of salary.

The limitations period set out in section 3731(b) is tied to "the date on which the violation of section 3729 is committed." 31 U.S.C. § 3731(b)(1) (2000). This language comes directly from section 3730(a) (creating a cause of action to be brought by the United States) and section 3730(b) (creating a *qui tam* action). The retaliatory discharge provision (section 3730(h)), however, is completely devoid of any reference to a "violation of section 3729."

A violation of section 3729 is simply not an element of a cause of action for retaliatory discharge under section 3730(h). The retaliation plaintiff does not have to prove a violation of section 3729. *United States ex rel. Chandler v. Cook County*, 277 F.3d 969, 973 (7th Cir. 2002) ("The whistleblower protection extends to any relator who brings a [*qui tam*] claim in good faith, whether or not it is successful."), *aff'd*, 538 U.S. 119 (2003); S. REP. NO. 99-345, at 35 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5300 ("[T]he employer would not have to be proven in violation of the False Claims Act in order for [the retaliatory discharge provision] to protect the employee's actions.").

Because a retaliatory discharge action does not depend on a violation of section 3729, the limitations period of section 3731(b), which is triggered by a violation of section 3729, is not applicable to a cause of action for retaliatory discharge. Section 3731(b) only supplies a limitations period for those causes of action (an action under section 3730(a) and (b)) that are predicated upon a violation of section 3729. Accordingly, applying section 3731(b) to a retaliatory discharge action "is like cramming squares in circles." (Pet. App.32a (Wilkinson, J., dissenting))

Under the rationale adopted by Fourth Circuit, when an employee incorrectly (but in good faith) blows the whistle on her employer, any retaliatory discharge claim brought by that employee will never be time barred. Faced with this hole in the Fourth Circuit's interpretation of section 3731(b), Respondent

and the United States suggest that the Court revise section 3731(b) by inserting the word "alleged." They argue that section 3731(b) should be read as providing that any cause of action under section 3730 would be barred if brought "more than 6 years after the date on which the *alleged* violation of section 3729 is committed." (U.S. Br., p. 15; Resp. Br., p. 16) Under this rewording of section 3731(b), Respondent argues that the limitations period should run from the employee's mental impression as to when wrongdoing may have occurred, i.e., when the underlying violation is "believed by the employee to have occurred." (Resp. Br., p. 16)

The limitations period under section 3731(b), however, does not run from an alleged violation of section 3729. It runs from a *proven* violation of section 3729. Both the Attorney General in an action under section 3730(a) and the relator in a *qui tam* action under section 3730(b) must prove a violation of section 3729, and the violation so proven must have occurred within six years of the filing of the complaint. The defendant has a valid statute of limitations defense to False Claims Act violations that are proven at trial if those violations occurred more than six years prior to the filing of the complaint.

The United States confuses the issue by arguing that if the statute of limitations runs from the *proven* violation of section 3729, a defendant could never prevail on a motion to dismiss. (U.S. Br., p. 17) The United States ignores the fact that a motion to dismiss is directed to the sufficiency of the allegations of the complaint (i.e., whether a violation of section 3729 can ultimately be proven given the allegations of the complaint). The fact that a motion to dismiss allows a defendant to challenge the sufficiency of the allegations of the complaint, however, does not mean that the triggering event for the limitations period of section 3731(b) is an *alleged* violation, rather than a *proven* violation.

Moreover, the rewriting of the statute advocated by Respondent and the United States would still leave many claims

for retaliatory discharge without a triggering event to start the limitations period running. An employee is protected under the False Claims Act when she undertakes an investigation of *possible* fraud. Certainly at the preliminary stages of such an investigation, the employee will be unlikely to know the magnitude of the *possible* fraud or even the time frame for this *possible* fraud. When an employee is discharged before her investigation is completed, there may be no date parameters for the *possible* fraud at issue. Without such date parameters, an *alleged* violation would be meaningless as a trigger for the limitations period.

The theory put forth by Respondent and the United States would require this Court to rewrite the language of section 3731(b). Their request that this Court insert the word "alleged" into section 3731(b) demonstrates that their interpretation of the False Claims Act does not flow from the literal language of the statute.

B. Respondent's reliance upon the phrase an "action under section 3730" is misplaced.

Both Respondent and the United States argue that because a retaliatory discharge action is set out in section 3730(h), a retaliatory discharge action falls within the literal scope of section 3731(b) since such a claim is "an action under section 3730." (Resp. Br., p. 8; U.S. Br., p. 10) They contend that Congress knew how to differentiate among the three actions that can be brought under section 3730 and that where Congress did not differentiate, the phrase "action under section 3730" refers to all three actions. If their argument were correct, a plaintiff could only prevail in a retaliatory discharge action when the United States comes forward and proves the plaintiff's case at trial. The literal language of section 3731(c) states:

> (c) In *any action brought under section 3730*, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

31 U.S.C. § 3731(c) (2000) (emphasis added). Under the reasoning of Respondent and the United States, the United States must prove the elements of a retaliatory discharge action by a preponderance of the evidence. Although such a result would appear to be odd, it would be no more bizarre than concluding that section 3731(b) should be construed in such a way that: (1) employees could receive a windfall of 40 years of backpay by delaying suit, *see* U.S. Br., pp. 18-19 n.6; NELA Br., p. 23, or (2) the accrual of the limitations period is divorced from the elements of the cause of action. Just as the Court must look to other language within section 3731(c) to determine what the phrase an "action under section 3730" means in the context of that section, the Court must look to other language within section 3731(b) to determine the meaning of that phrase in section 3731(b).

Section 3731(c) demonstrates that Congress meant different things when it used the phrase an "action under section 3730" in various places throughout the False Claims Act. Despite the United States' Herculean efforts to explain away the ambiguities that plague the False Claims Act, the fact remains that the phrase "an action under section 3730" does not resolve the question as to whether Congress meant to refer to an action by the United States, a *qui tam* action by a relator, a retaliatory discharge action, or some combination thereof.

The False Claims Act, and particularly section 3731(b), must be read in context. When read in context, the operative language of section 3731(b) is the phrase "the date on which the violation of section 3729 is committed." In section 3731(b), Congress was only speaking to actions in which a "violation of

section 3729" stands as an element of the cause of action. Congress was not attempting to address a retaliatory discharge action where the plaintiff may prevail regardless of whether a "violation of section 3729" was committed by the defendant.

IV. CONGRESS DID NOT INTEND TO CREATE A "UNIFORM LIMITATIONS PERIOD" FOR ALL ACTIONS BROUGHT UNDER SECTION 3730.

Apparently recognizing that its construction of section 3731(b) would put the False Claims Act "at odds with other limitations provisions governing retaliatory discharge claims," the United States attempts to explain this oddity by arguing that Congress intended to create a "uniform limitations period." (U.S. Br., pp. 21-22) Specifically, the United States argues that Congress intended that all three claims under section 3730 would be brought in the same action. The United States, however, is unable to point to any manifestation of such an intent by Congress. Neither the Act, the Committee Report, nor congressional debate refers to an intent to force the trial of simple employment law disputes to occur simultaneously with complex fraud trials.

The United States contends that Congress established uniform jurisdictional and procedural rules for all actions under section 3730 and argues that this evidences congressional intent for retaliation actions to be litigated with *qui tam* actions. The United States points to sections 3731 (a), (b), and (c) as well as section 3732(a) and (b) as evidence of Congress' intent in this regard. (U.S. Br., p. 22)

Only two of the five provisions cited apply to all claims brought under section 3730: the subpoena provision of section 3731(a) and presumably the jurisdiction/venue provision in section 3732(a). *Compare* 31 U.S.C. § 3732(a) (establishing a venue provision as to "any action under section 3730") *with* 31 U.S.C. § 3730(h) (addressing venue in retaliatory discharge

actions). Neither the subpoena provision nor the jurisdiction/venue provision contain a hint of congressional intent for the *qui tam* and retaliation actions to be litigated together. The other provisions relied upon by the United States do not support its position. Section 3732(b) applies to state law claims; section 3731(c) applies to actions brought by the United States, *see* U.S. Br., p. 14; and section 3731(b) is the very limitations provision at issue in this case. Thus, the False Claims Act itself does not demonstrate congressional intent for retaliation claims to be litigated with either the *qui tam* claim or the Government's action.

The United States' argument that Congress wanted all three types of claims created in section 3730 to be brought in the same action is perplexing. The violation of section 3729 may be separated by several years from the retaliatory act. The primary example of this is where an employer retaliates against an employee for testifying at trial in a false claims action brought by the United States. *See* 31 U.S.C. § 3730(h) (2000) (expressly protecting employees who give "testimony" in a false claims action). The United States offers no explanation as to why a federal district court that is trying a false claims action should suddenly stop the trial, allow a complaint for retaliatory discharge action to be filed in that same action, permit adequate discovery on the retaliatory discharge claim, and then resume the trial of the action. Moreover, Congress undoubtedly did not intend that a simple employment law dispute would necessarily be tried simultaneously with a complex fraud action. The Federal Reporter is replete with examples of complex actions under the False Claims Act that take a decade to try. *See, e.g., United States ex rel. Stone v. Rockwell Int'l Corp.*, 265 F.3d 1157 (10th Cir. 2001) (10 year lag between filing of *qui tam* action and jury verdict). If a retaliatory discharge action is tried simultaneously with such a complex action, the joinder of the two will simply delay the immediate relief contemplated by 3730(h) (reinstatement), may cause an employee to go years

without redress and will subject employers to tremendous potential damages because of the doubling of backpay that accrues while awaiting the trial of the action.

If, in fact, Congress had intended to ensure that the employment law claims of an employee who has suffered retaliation not precede the filing of the *qui tam* action, Congress would have preempted state law causes of action. In the absence of preemption, the limitations period for state law causes of action will drive when an employee who has suffered retaliation must file her complaint. In most cases in which a plaintiff alleges a violation of section 3730(h), the plaintiff also alleges state law claims such as retaliatory discharge in violation of the public policy of the state, breach of contract or intentional infliction of emotional distress. In his treatise on the False Claims Act, James Helmer, one of the leading plaintiff attorneys in this area of the law, encourages practitioners to add state law claims when filing an action under section 3730(h). JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION § 13-7 & App. 8, at 918-99 (3d ed. 2002). Thus, the United States can hardly argue in favor of "uniformity," when the time period when an employee must come forward with her bundle of rights is already governed by state limitations periods.[3]

Separating retaliation claims from the *qui tam* claims would not cause the dire consequences suggested by the United States. The United States contends that if a retaliatory discharge action is tried separately from an action under section 3730(a) or (b), the Government will lose its opportunity "to

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[3] As reflected by *United States ex rel. Hindo v. University of Health Sciences*, 1993 U.S. Dist. LEXIS 17306 (N.D. Ill. 1993), if a plaintiff prosecutes an action under state law relating to the discharge but fails to include an action under 31 U.S.C. § 3730(h), principles of *res judicata* will bar a later action under section 3730(h).

investigate the allegations of fraud before the defendant is aware that it is a target." (U.S. Br., p. 23) If an employer has retaliated against the employee, however, the employer by definition must know that the employee is investigating purported fraud by the employer. The employer's knowledge that it is being investigated precedes the retaliation, which of necessity precedes the filing of the 3730(h) lawsuit. Thus, an employee's filing of a section 3730(h) claim is not what affects the government's ability to investigate, if its ability to investigate is affected at all. Moreover, the vast arsenal of pre-suit discovery available to the United States pursuant to 31 U.S.C. § 3733 is completely unaffected by whether an employee has filed a retaliatory discharge action.

The United States asserts that if the retaliatory discharge action is filed before the *qui tam* action, the *qui tam* action may be barred because of the public disclosure rule of 31 U.S.C. § 3730(e)(4)(A). The public disclosure rule, however, only bars a *qui tam* action if the *qui tam* action is based upon information that is in the public domain (*i.e.*, information taken from a news media report, congressional investigation or a criminal, civil or administrative hearing). The public disclosure rule was designed to prevent "parasitic" lawsuits. *United States ex rel. Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1207 n.6 (10th Cir. 2003) (*en banc*) ("the point of the public disclosure test is to determine whether the *qui tam* lawsuit is a parasitic one"). The public disclosure rule will not bar a *qui tam* action if the relator is the original source of the information upon which the *qui tam* action is based. 31 U.S.C. § 3730(e)(4) (2000). Accordingly, the United States' reliance upon the public disclosure rule is nothing more than a red herring.

The United States further asserts that this Court should not look to analogous state limitations periods because the periods in some states may be too short. Under North Carolina law, the limitations period governing an action for retaliatory discharge is three years. N.C. GEN. STAT. § 1-52 (2005). A

three year period for filing a retaliatory discharge action is simply not so short as to frustrate or interfere with the implementation of national policies. The United States, however, asserts that it believes the analogous limitations periods in five other states (Texas, Ohio, Hawaii, Kentucky and Florida) to be too short. (U.S. Br., p. 24) In its brief, the United States concedes that the limitations periods from these five states is not so short as to impede a plaintiff's ability to assert a claim for retaliatory discharge. (U.S. Br., p. 25) In fact, the Government readily acknowledges that a retaliatory discharge claim is "not particularly difficult to prepare." *Id.* Accordingly, the United States' concern about the length of the limitations periods in these five states is only relevant if one assumes that Congress intended to establish a limitations period that would ensure that in all situations a retaliatory discharge action may be joined with a *qui tam* action. As set forth above, given the fact that the act of retaliation may occur years after the submission of the false claim and years after filing of the *qui tam* action, such an assumption is incorrect.[4]

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[4] Moreover, the United States' conclusion as to the applicable limitations periods under several of these state laws is suspect. Citing the Fourth Circuit decision below, the United States asserts that retaliatory discharge claims would be governed by a 180 day limitations period under Texas law. (U.S. Br., p. 24) The Fourth Circuit noted that Texas Health & Safety Code Ann. §§ 161.132, 161.134 (Vernon 2002) is the most closely analogous state statute under Texas law. (Pet. App. 24a-25a) That statute, however, is specific to Texas' mental health laws. Texas' two year limitation period for personal injury claims would appear more appropriate. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2004); *McClure v. Zoecon*, 936 F.2d 777 (5th Cir. 1991) (applying two year period to retaliatory discharge action under ERISA).

The United States implies that the Hawaii Whistleblowers' Protection Act provides for a 90 day statute of limitations period. (U.S. Br., p. 24) The United States, however, fails to point out that this statute was

Even though separating the retaliation claim from the *qui tam* claim would not cause the dire consequences suggested by the United States, applying the most analogous state limitations period for retaliatory discharge actions under section 3730(h) would not preclude the filing of a retaliatory discharge action and a *qui tam* action in the same complaint. The United States argues that because many acts of retaliation will take place soon after a potential relator first suspects and inquires into potential fraud, a short state limitations period will force the employee "to severely truncate her investigation of the fraud claim, so that she could file the two claims together, or to sever the claims and file the retaliation claim first." (U.S. Br., p. 24) Once a whistleblower is discharged, however, she no longer stands as an insider and has very little opportunity to gather additional information in support of a false claims action. In essence, the employee will likely have all of the information she is ever going to get regarding the false claims action (in the absence of discovery devices available in litigation) at the time of her discharge. The filing of the 3730(h) lawsuit is not what limits the employee's ability to investigate; it is the employer's knowledge that the investigation is occurring. No matter what limitations period is applied, the employee's ability to continue an investigation is compromised once her employer has

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amended in 2002 and now provides for a two year limitations period. HAW. REV. STAT. § 378-63 (2003).

The United States notes that in *United States ex rel. Tillson v. Lockheed Martin Energy Sys., Inc.*, 2004 WL 2403114 (W.D. Ky. 2004), the employer argued that Kentucky Revised Statute § 61.103 (90 day limitations period for retaliation claims by government employee) should be applied to an action under section 3730(h). (U.S. Br., p. 24) Kentucky Revised Statute § 413.120 (five year limitations period), however, would appear to be more closely analogous. *See Pike v. Harold (Chubby) Baird Gate Co.*, 705 S.W.2d 947 (Ky. Ct. App. 1986) (applying five year limitations period to wrongful discharge action).

retaliated against her. Thus, the application of a state limitations period to retaliation actions brought under section 3730(h) will not force the employee to sever her *qui tam* claim from her retaliation claim.

Despite the United States' efforts to explain that Congress intended for all claims under section 3730 to be tried in the same action, the fact remains that Congress exhibited no such intent. The statutory sections cited by the United States do not demonstrate that Congress intended to put in place a "uniform limitations period."

V. THE ODDITY CREATED BY THE FOURTH CIRCUIT'S DECISION CANNOT BE EXPLAINED BY THE "UNIQUE NATURE" OF THE FALSE CLAIMS ACT.

The United States asserts that the oddity created by the Fourth Circuit can be explained by "the unique nature of the FCA." (U.S. Br., p. 22) The False Claims Act and the retaliatory discharge action it creates, however, are not unique. Both the False Claims Act and the Major Fraud Act, 18 U.S.C. § 1031, make it unlawful to defraud the Government. Both create a retaliatory discharge action and provide for reinstatement and recovery of double backpay. The private right of action created by the Major Fraud Act is virtually identical to that of the False Claims Act.[5] *Compare* 18 U.S.C.

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[5] The Major Fraud Act provides that any individual who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by an employer because of lawful acts done by the employee . . . in furtherance of a prosecution under this section (including investigation for, initiation of, testimony for, or assistance in such prosecution)" is entitled to reinstatement and double backpay. 18 U.S.C. § 1031(h).

§ 1031(h) *with* 33 U.S.C. § 3730(h); *see also* S. REP. NO. 100-503, at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5969, 5979 (retaliatory discharge provision of the Major Fraud Act is "similar to the one included in the False Claims Act").

The Major Fraud Act contains no limitations period with respect to a relatiatory discharge action. The Major Fraud Act was adopted just two years after the 1986 Amendments to the False Claims Act. Like the False Claims Act, the Major Fraud Act was intended to stem the tide of procurement fraud committed against the United States. Given the parallel nature of these two acts, it is unfathomable that Congress would have expressly provided for a limitations period in one but not the other.[6]

VI. THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS HAD NO INTENTION OF DEVIATING FROM EVERY OTHER WHISTLEBLOWER STATUTE ENACTED BY CONGRESS.

Prior to the 1986 Amendments, the statute of limitations under the False Claims Act read: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b)(1982). With the 1986 Amendments, Congress added a new cause of action (retaliatory discharge) that did not require the submission of a

[6] Only one reported decision has addressed the limitations period applicable to 18 U.S.C. § 1031(h). *Kowalski v. Alpha Kappa Alpha Sorority,* 993 F. Supp. 619 (N.D. Ohio 1997). In that decision, the court recognized that Congress failed to expressly provide for a limitations period for a retaliatory discharge action brought under 18 U.S.C. § 1031(h) but proceeded to apply by analogy the six year limitations period of 31 U.S.C. § 3731(b).

false claim to the Government (i.e., a violation of section 3729) as an element of the cause of action. When this new cause of action was added, Congress altered the language of the limitations period (section 3731(b)) so that the limitations period is now tied to violations of section 3729. Accordingly, the revised limitations period is only applicable to causes of action that are based upon a violation of section 3729. Because a violation of section 3729 is not an element of a cause of action for retaliatory discharge, the 1986 Amendments exclude retaliatory discharge actions from the scope of section 3731(b). Respondent is correct that Congress could have used different language to achieve the same result. The language that Congress chose in the 1986 Amendments, however, limits the scope of section 3731(b) to actions in which a violation of section 3729 is an essential ingredient.

The change in the language of section 3731(b) was made to Senate Bill 1562 shortly before it was enacted into law. S. 1562, 99th Cong., 2d Sess. (Aug. 15, 1986); 132 CONG. REC. 28,576 (1986). This change in the language to Senate Bill 1562 was made simultaneously with the movement of the retaliatory discharge provision from a separate section (proposed section 3734) into section 3730. *Id.* Accordingly, the drafting history reflects that Congress did not intend for the 6 year limitations period of section 3731(b) to apply to a simple employment law dispute.

With respect to the drafting history of the 1986 Amendments, the United States points to an earlier House Bill, H.R. 3317, that was introduced well over a year before the enactment of Senate Bill 1562. (U.S. Br., p. 20) Senate Bill 1562, not H.R. 3317, stands as the bill that was ultimately enacted by Congress into law. Using H.R. 3317, the United States argues that "Petitioners' legislative history argument [is based upon a] mistaken factual premise." (U.S. Br., p. 19) The language of bills introduced over a year prior to the enactment of the 1986 amendments in a prior session of Congress are

irrelevant. Moreover, the United States, however, misses the point. On September 9, 1986, one of the principal architects of the 1986 Amendments (Congressman Fish) stood up during the House debate and addressed the limitations period under the False Claims Act. 132 CONG. REC. 22,337 (1986). His remarks make clear that under the proposed legislation, as it existed as of that date, the limitations period of the False Claims Act was only intended to address actions filed on behalf of the Government. (Pet. Br., p. 21 (quoting remarks)) Section 3731(b) was not intended to apply to employees pursuing a retaliation claim for their own personal benefit. At the time Congressman Fish made these remarks, it is beyond question that the draft legislation to which he was referring did not have the retaliatory discharge provision set out in a separate stand alone section. 132 CONG. REC. 22,332 (1986). At the time Congressman Fish made his remarks, the retaliatory discharge provision was set out in section 3730. *Id.*

VII. THE DOCTRINE OF EQUITABLE TOLLING CANNOT EXPLAIN AWAY THE ABSURD RESULTS THAT FLOW FROM THE FOURTH CIRCUIT'S OPINION.

While some employees may benefit from the lengthy limitations period adopted by the Fourth Circuit, other employees will find their cause of action time barred before the cause of action has accrued. Such results are inevitable if one falls into the same trap as the Fourth Circuit of imposing a limitations period that is not tied to the elements of the cause of action. The Respondent and the United States take a cavalier approach to the employees who find themselves in this situation and argue that perhaps equitable tolling will save these claims.

Such an approach suffers from two errors. First, the very justification that the United States puts forward as to why Congress may have deviated from every other statute of

limitations in the Country is that such an approach will produce a "uniform limitations period." By arguing that the limitations period for a retaliatory discharge action may be expanded by equitable tolling, the United States effectively concedes that the limitations periods that it envisions for an action by the United States under section 3730(a), a *qui tam* action under section 3730(b) and a retaliatory discharge action under section 3730(h) are not really "uniform."

Second, the Respondent and the United States ignore the limited nature of equitable tolling. Equitable tolling applies when the defendant deceives or misleads the plaintiff to conceal the existence of the cause of action. *See English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988). Under the Respondent's theory, an employee can bring a retaliatory discharge up to six years from the date of the underlying violation. When the protected activity (e.g., testimony in a false claims action) does not even occur until after this six year period, the employee will simply not be in a position to allege that the employer took some action that prevented the employee from filing her complaint within this six year period.[7]

In those cases where the United States has caused a complaint to remain under seal for several years, by the time the case is tried, more than six years will have passed from the date of the violation of section 3729. When witnesses are called to

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[7] In addition to equitable estoppel, the United States argues that an employee's claim may also be saved by allowing the retaliatory discharge action to relate back to the date an action under section 3730(a) is filed by the United States. (U.S. Br., p. 29) Such an approach would dramatically rewrite the principles governing relation back of claims. *See, e.g.*, 6A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE & PROCEDURE § 1501, at 159 (2d ed. 1990) ("an amendment that seeks to add a new plaintiff who asserts an entirely different claim will not relate back").

testify at trial, none of those witnesses, under the Government's theory, will be entitled to protection from retaliation. Equitable tolling cannot save those witnesses from retaliatory conduct.

If the limitations period for a retaliatory discharge action were to accrue from the date of the underlying False Claims Act violation rather than the act of retaliation, the vast majority of witnesses who are called to testify in false claims actions will have no protection against retaliation. Congress should not be presumed to have been so short-sighted in its drafting of the False Claims Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

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(9)

No. 04-169

In the Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the limitations period provided in 31 U.S.C. 3731(b)(1) applies to a claim for retaliatory discharge under the False Claims Act, 31 U.S.C. 3730(h).

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2A Norman J. Singer, *Statutes and Statutory Construction* (6th ed. 2000)	11

In the Supreme Court of the United States

No. 04-169

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case concerns the limitations period for an employee to bring a civil action for retaliation under the False Claims Act, 31 U.S.C. 3730(h). Congress enacted the anti-retaliation provisions of Section 3730(h) as part of the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153. A chief purpose of those amendments was to enlist private individuals in the battle against fraud under federal programs, including by encouraging them to investigate fraud and to bring meritorious *qui tam* actions on behalf of the United States. Section 3730(h) promotes that purpose by protecting those who help to ferret out fraud from retaliation in their employment. The United States has a significant interest in ensuring that the statute of limitations is construed in a manner that furthers this important Congressional policy.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, is "the primary vehicle by the Government for recouping losses

suffered through fraud." H.R. Rep. No. 660, 99th Cong., 2d Sess. 18 (1986) (House Report). The FCA prohibits the making of false or fraudulent claims to the United States, 31 U.S.C. 3729(a)(1), as well as a variety of related deceptive practices involving government funds and property, 31 U.S.C. 3729(a)(2)-(7). The Act imposes civil penalties and treble damages in the event of a violation. 31 U.S.C. 3729(a).

In 1986, Congress revised and updated the FCA in the False Claims Amendments Act of 1986 (FCA Amendments), Pub. L. No. 99-562, 100 Stat. 3153, to make the statute a "more useful tool against fraud in modern times." *Cook County* v. *United States ex rel. Chandler*, 538 U.S. 119, 133 (2003) (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (Senate Report)). One principal purpose of this legislative overhaul was to "increase[] incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." Senate Report 2; see *Cook County*, 538 U.S. at 133 (FCA Amendments "enhanced the incentives for relators to bring suit"). Thus, the FCA Amendments expanded the potential recovery available to relators, relaxed the bar against *qui tam* actions based on information in the government's possession, and authorized relators to maintain an active role in the litigation even if the government intervenes. See § 3, 100 Stat. 3154-3157.

As amended, Section 3730 of the FCA creates three causes of action. Section 3730(a) provides that, if the Attorney General finds that a person has violated or is violating 31 U.S.C. 3729—the section of the FCA that specifies substantive prohibitions regarding false claims and the resulting liability for them—the Attorney General may bring a civil action against the person. 31 U.S.C. 3730(a). Section 3730(b) provides that a *qui tam* relator may bring a civil action for a violation of Section 3729 "for the person and for the United States Government." 31 U.S.C. 3730(b)(1). Finally, Section 3730(h) provides a cause of action for an employee who is retaliated against by her employer for investigating, bringing,

or otherwise assisting in bringing an action under Section 3730. 31 U.S.C. 3730(h). In such an action, the employee is entitled to all the relief necessary to make her whole, including reinstatement, two times the amount of back pay plus interest, any special damages, and attorneys' fees and other litigation costs. *Ibid.*

When a relator files a *qui tam* action under Section 3730(b), as amended, the complaint must be filed under seal, and the relator must provide a copy of the complaint and supporting information to the United States, which has 60 days to decide whether to intervene in the suit, 31 U.S.C. 3730(b)(2), although that 60-day period may be extended for good cause shown, 31 U.S.C. 3730(b)(3). If the government intervenes, it shall have the primary responsibility for prosecuting the action, although the relator has a right to continue as a party in the litigation, subject to certain limitations. 31 U.S.C. 3730(c). If a *qui tam* action results in a recovery of damages and civil penalties, the recovery is divided between the government and the relator, with the relator receiving a maximum of 30% of the total award. 31 U.S.C. 3730(d).

The Act's anti-retaliation provision was added in 1986. 31 U.S.C. 3730(h). In the hearings that preceded the 1986 amendments, the responsible committees of the House of Representatives and the Senate heard extensive testimony regarding the unwillingness of potential whistleblowers to expose fraud against the government for fear of reprisal.[1] Congress therefore provided the new federal right of action "to halt companies and individuals from using the threat of economic retaliation to silence 'whistleblowers', as well as assure those who may be considering exposing fraud that

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[1] See Senate Report 4-6; *False Claims Reform Act: Hearing Before the Subcomm. on Admininistrative Practice and Procedure of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 48-101 (1985); *False Claims Act Amendments: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 371-372, 387, 392-416 (1986).

they are legally protected from retaliatory acts." Senate Report 34. Section 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

Congress also amended the FCA's statute of limitations as part of the 1986 revisions. As amended, Section 3731(b) provides that "[a] civil action under section 3730" must, as a general matter, be brought within "6 years after the date on which the violation of Section 3729 is committed." 31 U.S.C. 3731(b)(1). The FCA also provides an alternative limitations provision for circumstances in which the violation was initially concealed, allowing suit to be brought within "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. 3731(b)(2).

2. a. Respondent Karen T. Wilson was formerly employed as a secretary for petitioner Graham County Soil and Water Conservation District. J.A. 17. In December 1995, respondent reported to the United States Department of Agriculture (USDA) what she believed to be fraud by petitioners in connection with a federal disaster relief program known as the Emergency Watershed Protection Program, administered by the Natural Resources Conservation Service (NRCS)—an agency of USDA. J.A. 17, 25-26. Shortly thereafter, respondent met with agents of USDA's Office of Inspector General (OIG) and their state counterparts. J.A. 26-27. With respondent's assistance, the federal and state agencies undertook investigations of respondent's allegations, which continued through 1998. J.A. 27.

b. On January 25, 2001, respondent filed suit against petitioners in the United States District Court for the Western District of North Carolina. J.A. 3, 11. The complaint alleges a *qui tam* claim, pursuant to Section 3730(b), for violations of Section 3729, and a claim of retaliatory discharge under Section 3730(h). J.A. 30-33. According to the allegations of the complaint, petitioners made numerous false claims for payments funded by NRCS under the Emergency Watershed Protection Program. J.A. 17. Among the false claims respondent witnessed were claims for payment pursuant to no-bid or non-existent contracts and for work that had not been performed. J.A. 18-20. Petitioners allegedly made similar false claims under agricultural programs administered by the State of North Carolina that were subsidized by federal funds. J.A. 20-24.

The complaint also alleges that respondent was subjected to workplace retaliation from 1996 to 1997, resulting in her constructive discharge. The Chairman of the Graham County Commission threatened to terminate respondent's position if she did not stop assisting the federal investigation. J.A. 28. Respondent received numerous threats against her and her family, and on one occasion a gun barrel

was left on the desk in her office. *Ibid.* Those acts of harassment so disturbed respondent that she was forced to take medical leave in 1996. J.A. 29-30. Although respondent returned to work, the harassment continued, and she was ultimately forced to resign on March 7, 1997. J.A. 30.

The United States declined to intervene in the *qui tam* action, J.A. 3, and respondent proceeded with the litigation.

c. On petitioners' motion, the district court dismissed respondent's retaliation claim as untimely. Pet. App. 67a-70a. The court held that retaliation claims under Section 3730(h) are not governed by the FCA's six-year limitations period but instead are subject to the most closely analogous state-law statute of limitations. The court determined that North Carolina's three-year limitations period for wrongful discharge was most analogous, *id.* at 69a, and held that respondent's retaliation claim, which had been filed three years and ten months after her constructive discharge, was therefore time-barred, *id.* at 70a. The district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. 85a-86a.

d. A divided panel of the Fourth Circuit reversed. Pet. App. 1a-41a. The majority held that, because the phrase "an action under § 3730 * * * necessarily includes an action for retaliation under § 3730(h)," the "effect of the language [of 31 U.S.C. 3731(b)(1)] as written" is to require that a retaliation action under Section 3730(h) be brought within six years of the date on which the underlying violation of Section 3729 was committed. Pet. App. 5a-6a.

The court of appeals considered petitioners' arguments and found that none of them succeeded in rendering the text of Section 3731(b)(1) ambiguous. Pet. App. 13a. According to the court, Section 3731(b)(1)'s identification of the underlying substantive violation of Section 3729 as the triggering event to commence the running of the limitations period did not, as petitioners contended, impliedly limit its scope to actions by the Attorney General or a *qui tam* relator under

Section 3730(a) or (b) based on a substantive violation of the Act, because an actual or potential Section 3729 violation is also central to a retaliation suit under Section 3730(h). *Id.* at 14a. The court noted from the legislative history that Congress had viewed the anti-retaliation protections of Section 3730(h) as closely related to the whistleblower provisions of Section 3730(b), and that Congress had, in fact, rejected a proposal to place the retaliation cause of action in a separate section, in favor of locating it within Section 3730, where it would be subject to the limitations provision in 31 U.S.C. 3731(b) applicable to a "civil action under section 3730." Pet. App. 15a-16a.

The court of appeals also rejected petitioners' argument that it would be absurd to apply Section 3731(b)(1) to retaliation claims because the six-year period from the date of the violation could end before the retaliation occurred and therefore before the cause of action for retaliation occurred. The court noted that this could happen, for example, if the employee first reported the violation of Section 3729 shortly before the six-year period expired, or the employer chose to wait out whatever portion of the six-year period remained before taking retaliatory action. Pet. App. 19a. The court observed that such cases were certain to be the exception, rather than the rule, *id.* at 20a, and that in particular circumstances—such as an employer's deliberate delay in retaliating until after the limitations period had run—equitable doctrines of estoppel might apply, *id.* at 20a-21a. Nor, the court said, would application of Section 3731(b)'s limitations period require a retaliation plaintiff to prove an actual violation of Section 3729 in order to assert a valid and timely retaliation claim, because the timeliness of an action based on retaliation depends on whether the suit was filed within six years of the alleged violation of Section 3729, not on proof of an actual violation. *Id.* at 22a-24a.

Finally, the court of appeals noted that the application of state statutes of limitations to FCA retaliation claims, as ad-

vocated by petitioners, would undermine Congress's purposes in several respects. The court explained that shorter state limitations periods, some as short as 180 days, would be too abbreviated for a plaintiff to "marshal the evidence" necessary to file a retaliation claim. Pet. App. 24a-25a. Indeed, the court continued, uncertainty regarding which State's law, out of potentially numerous relevant jurisdictions, governed, and which of a particular State's many statutory periods was most analogous, would make it very difficult for many *qui tam* relators to determine the deadline for filing a retaliation claim. *Id.* at 25a-27a. Thus, the court concluded, the application of state law would undermine the protection Congress intended Section 3730(h) to provide for whistleblowers. *Ibid.*

Judge Wilkinson dissented. Pet. App. 28a-41a. He would have held that Section 3731(b)(1)'s reference to the "violation of section 3729" as the date on which the limitations period starts to run impliedly excludes suits under Section 3730(h) from the provision's scope. *Id.* at 31a. The dissent also found it incongruous that the limitations period could run before the retaliatory act took place. *Ibid.* Accordingly, Judge Wilkinson would have borrowed the most closely analogous period under state law. *Id.* at 39a.

SUMMARY OF ARGUMENT

Section 3731(b) of the FCA provides the limitations period for "[a] civil action under section 3730," 31 U.S.C. 3731(b), a phrase that, by its terms, plainly encompasses each of the three causes of action created by Section 3730, including a civil action under subsection (h) of Section 3730 for retaliation. There is a strong presumption that Congress means what it says in statutes, and there are no reasons to disregard that presumption here. Rather, the broader context and purposes of the FCA confirm that Section 3731(b) means what it says.

Congress consistently used the phrase "action under section 3730" throughout the provisions governing the jurisdictional and procedural aspects of claims under the FCA. By contrast, in the more substantive context of Section 3731(d), Congress specifically limited the preclusive effect of guilty and nolo contendere pleas in criminal prosecutions for false or fraudulent claims to "any action * * * brought under *subsection (a) or (b)* of section 3730." 31 U.S.C. 3731(d) (emphasis added). Congress's express exclusion of retaliation claims from Section 3731(d), and the absence of such an exclusion in Section 3731(b), confirms that Congress intended Section 3731(b) to apply to retaliation claims.

Moreover, by making retaliation actions under Section 3730(h) subject to the same rules governing actions under the other subsections of Section 3730, Congress furnished a mechanism for retaliation claims and substantive FCA violations to be litigated together. That practice furthers the FCA's statutory scheme, which is designed to allow potential relators and the government to engage in a full investigation of the case without the defendant becoming aware of it. In contrast, if short state limitation periods—some as short as 90 days—were to apply, a relator would often have to bring her retaliation claim separately, or to file her *qui tam* complaint prematurely before her investigation was complete. In either event, the enforcement mechanisms of the FCA would be undermined. Moreover, prior disclosure of the fraud allegations in a retaliatory discharge suit would raise questions concerning the ability of the person to bring a subsequent *qui tam* suit, due to the FCA's bar against a *qui tam* suit where there has been a public disclosure of the underlying information, 31 U.S.C. 3730(e)(4). By establishing a single statute of limitations for both retaliation and *qui tam* claims, Section 3731(b) avoids these problems.

ARGUMENT

THE FALSE CLAIMS ACT'S SIX-YEAR STATUTE OF LIMITATIONS APPLIES TO ANY "ACTION UNDER SECTION 3730," WHICH, BY ITS TERMS, ENCOMPASSES A RETALIATION ACTION UNDER SECTION 3730(h).

"[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. * * * [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). This is not a case in which the statute does not plainly provide for a statute of limitations for an action, like respondent's, brought under Section 3730. Section 3731(b) of the False Claims Act provides the limitations period for "[a] civil action under section 3730," 31 U.S.C. 3731(b), a phrase that manifestly includes an action under subsection (h) of Section 3730. That should end the matter. "[W]hen 'the statute's language is plain, the sole function of the courts'—at least where the disposition required by the text is not absurd—'is to enforce it according to its terms.'" *Hartford Underwriters Ins.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)). There is certainly nothing absurd about a uniform federal limitations rule for all FCA actions, which permits ease of application and ensures that an employee retaliated against for investigating a false claim could bring her retaliation action together with the related *qui tam* suit.

A. The FCA's Text Unambiguously Provides That Retaliation Claims Under Section 3730(h) Are Governed By The Limitations Period In Section 3731(b)

The application of Section 3731(b)'s limitations period to all actions under Section 3730, including retaliation claims under Section 3730(h), could hardly be clearer. The burden

thus rests with petitioners to show why that uniform limitations period is, in fact, absurd.

Petitioners urge several theories why, in their view, the structure and context of the FCA suggest an implied limitation on the scope of Section 3731(b). See Pet. Br. 11-15. None of those arguments, however, overcomes the central point that a retaliation action under 31 U.S.C. 3730(h) is "[a] civil action under section 3730," and, thus, comes within the plain text of the statute of limitations provided in Section 3731(b). And none comes close to the kind of showing of absurdity required for a court to conclude that Congress, in fact, provided *no* federal statute of limitations for a Section 3730(h) action, despite its apparent provision of a clear statute of limitations for *all* Section 3730 actions. There is no reason why Congress would have used the various modes of indication suggested by petitioners to signal an implied exclusion of Section 3730(h) claims from the scope of Section 3731(b) when it could have done so succinctly and directly by expressly limiting Section 3731(b) to an action "under subsection (a) or (b) of section 3730." In fact, Congress used precisely that limiting language in another subsection of Section 3731. See 31 U.S.C. 3731(d) (limiting the preclusive effect of nolo contendere and guilty pleas in any criminal proceeding charging false or fraudulent statements to actions brought "under subsection (a) or (b) of section 3730"). Where, as here, Congress "uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa* v. *Alvarez-Machain*, 124 S. Ct. 2739, 2754 n.9 (2004) (quoting 2A Norman Singer, *Statutes and Statutory Construction* § 46:06, at 194 (6th ed. 2000)). None of petitioners' theories overcomes that presumption, let alone the plain text of Section 3731(b).

1. Petitioners contend that it is permissible to read an implied limitation into the text of Section 3731(b) because of what they view as "Congress' lack of precision in drafting."

Pet. Br. 14. Petitioners maintain that "the phrase 'an action under section 3730' means different things" in different provisions of the FCA and that the phrase is therefore "ambiguous." *Ibid.* It is true that some FCA provisions that use the phrase "action under section 3730" may not have relevance to an action under Section 3730(h). But that is because of other language within those provisions that makes clear that they do not apply. Thus, the use of the general phrase "action under section 3730" in various places in the FCA does not authorize the courts to read an implied exclusion of Section 3730(h) actions into provisions that do, by their terms, apply to such suits.

A review of the FCA's use of the phrase "action under section 3730" reveals that Congress consistently used that general phrase when discussing jurisdictional or procedural aspects of claims under the FCA. Congress's reference to all actions under Section 3730 when establishing the procedural rules that would govern them reflects its recognition that, because of the interrelatedness of the various causes of action created by Section 3730, they would often be litigated together. Thus, when Congress established a nation-wide subpoena power, 31 U.S.C. 3731(a), a statute of limitations, 31 U.S.C. 3731(b), a standard of proof, 31 U.S.C. 3731(c), a rule of venue, 31 U.S.C. 3732(a), and a rule of supplemental jurisdiction, 31 U.S.C. 3732(b), for FCA actions, it uniformly made those provisions applicable to all "action[s] under section 3730." The general applicability of those procedural rules ensures that a *qui tam* relator will be able to litigate her substantive FCA action under Section 3730(b) in the same manner as the Attorney General may litigate his substantive FCA action under Section 3730(a), and that the relator will be able to litigate any retaliation claim she may have under Section 3730(h) together with and subject to the same procedural rules as her action under Section 3730(b).

In contrast to Congress's uniform extension of these procedural provisions to any "action under Section 3730," when

Congress addressed the more substantive rule concerning the collateral estoppel effect of a criminal conviction on a related claim under the FCA, Congress expressly limited the preclusive effect to "any action * * * brought under *subsection (a) or (b)* of section 3730." 31 U.S.C. 3731(d) (emphasis added). Like Section 3731(b), Section 3731(d) was enacted as part of the 1986 FCA Amendments. See § 5, 100 Stat. 3158. Section 3731(d)'s careful delineation of its scope as reaching only an action under "subsection (a) or (b) of section 3730," in contrast to the Amendments' use elsewhere of the broader phrase "action under section 3730," demonstrates both that Congress recognized that the causes of action under subsections (a) and (b) are only a subset of those available under Section 3730, and that Congress knew how to exclude actions under Section 3730(h) when it wished to do so. Because Congress expressly excluded retaliation claims from Section 3731(d), but did *not* do so in Section 3731(b), the obvious inference is that Congress intended Section 3731(b) to mean what it says. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[2]

Petitioners note that Section 3731(c) provides that "[i]n any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evi-

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[2] Of course, Congress presumably excluded retaliation actions under subsection (h) of Section 3730 from the scope of Section 3731(d) because it concluded that pleas in criminal cases involving false or fraudulent statements would have no logical application in actions based on retaliatory conduct by an employer. The absence of such an exception in Section 3731(b) thus reinforces the conclusion that Congress made no such judgment about the FCA's general statute of limitations.

dence." Pet. Br. 12 (emphasis omitted). Petitioners reason from this provision that because "[t]he only action that the federal government can bring under the [FCA] is an action by the Attorney General under section 3730(a)," the phrase "action * * * under section 3730" in Section 3731(c) excludes retaliation claims, and the Court is therefore free to read that phrase to exclude retaliation claims in other provisions as well. *Id.* at 12-13. But Section 3731(c) is inapplicable to retaliation claims not because the phrase "*action * * * under section 3730*" actually means only a subset of Section 3730 actions, but rather because *other* language in Section 3731(c) refers solely to the United States' obligations. Cf. *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253-254 (2004). As a result, Section 3731(c), by its terms, applies only to Section 3730 actions *that are brought by the United States*. Section 3731(c) therefore has no application to *qui tam* actions brought by a relator under Section 3730(b) or a retaliation claim under Section 3730(h).[3] Yet that does not mean that the phrase "action under section 3730" actually means only Section 3730(a) claims elsewhere in the FCA, including the statute of limitations in Section 3731(b).[4]

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[3] Although, as discussed in the text, Section 3731(c) has practical consequences only with respect to a suit brought by the United States, its purpose was to bring uniformity to the procedural rules governing actions under Section 3730, not to introduce disparities among them, as petitioners suggest (Br. 12-13). See Senate Report 31 (indicating that the purpose of Section 3731(c) was to repudiate the view, which had been expressed by some courts, that, unlike qui tam plaintiffs, the United States, as sovereign, must meet a heightened standard of proof of fraud in FCA actions).

[4] Petitioners' reliance on 31 U.S.C. 3732(b) suffers from the same flaw. Section 3732(b) establishes supplemental jurisdiction over State and local claims to recover for false claims "if the action arises from the same transaction or occurrence as an action brought under section 3730." Petitioners contend (Br. 13) that here the phrase "an action brought under section 3730" clearly does not encompass a retaliatory discharge action under Section 3730(h) because retaliation is personal to the employee and thus would not be part of the same transaction or occurrence that would give rise to a state false claims action. Again, the likely inapplicability of Section 3732(b) to most (or we may even assume all) retaliation actions under Section 3730(h) stems not from an implied limitation in the phrase "action brought under section 3730," but from the other language in Section 3732(b) referring to the same "transaction or occurrence."

2. Petitioners maintain that the identification of a "violation of section 3729" in Section 3731(b)(1) as the event that commences the running of the limitations period excludes actions under Section 3730(h) from Section 3731(b)'s scope because "Section 3729 * * * 'strictly addresses false claims, not retaliation claims.'" Pet. Br. 9 (quoting *United States ex rel. Lujan* v. *Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998)). While it is true that Section 3729 does not address retaliation claims under Section 3730(h), the converse is not true: Section 3730(h), which establishes the retaliatory discharge cause of action, *does* have a nexus to—and in this sense "subsumes" (Pet. App. 14a)—a violation of Section 3729. A necessary element of a retaliation claim under Section 3730(h) is that the plaintiff was engaged in protected conduct relating to "an action filed or to be filed under this section." 31 U.S.C. 3730(h). Thus, *any* "civil action under section 3730," including a retaliation action under Section 3730(h), must at some point involve at least an alleged or suspected violation of Section 3729. In this respect, the situation for a retaliation action is parallel to when the Attorney General or a relator brings an action for a substantive FCA violation under Section 3730(a) or (b). The requirement in Section 3731(b)(1) that the action be brought within six years of the violation of Section 3729 must be understood to refer to the conduct that is alleged to be a violation of Section 3729. The fact that Congress identified a Section 3729 violation as triggering the limitations period in Section 3731(b)(1) therefore does not imply that Section 3731(b) is inapplicable to retaliation claims.

Petitioners further contend (Br. 19) that "[i]f Congress had intended a retaliatory discharge action to be governed

by a six year limitations period, there would have been no reason for Congress to have [amended the pre-1986] words 'from the date the violation is committed.'" It is very odd to think, however, that Congress chose to exclude retaliation claims from Section 3731(b) in so cryptic a manner as adding the words "of Section 3729" to Section 3731(b)(1) when it could have accomplished that result more simply and clearly by expressly limiting Section 3731(b) to actions "under subsection (a) or (b) of Section 3730," as Congress did in Section 3731(d). See p. 13, *supra*.

Moreover, petitioners' argument overlooks that leaving the pre-1986 limitations period unchanged, without tying the limitations period to the underlying violation of Section 3729, would have created a different limitations period that would allow FCA retaliation claims to be brought long after the underlying fraud had grown stale. That would have frustrated Congress's intent to have retaliation claims litigated promptly, and to encourage that such claims be brought within the framework of the action under Section 3730(a) or (b) for a substantive violation of the Act. If an employee uncovered a false claim three years after it was made and was promptly fired for exposing the employer, the employee would have had three years to file the *qui tam* action but could wait another three years (until nine years after the underlying fraud) to bring a retaliatory discharge claim. Congress presumably had no intent in allowing retaliation claims to be separated from the underlying *qui tam* action and filed years after both that action and the violation. Petitioners' proposal to apply state law limitations periods, starting at the time of the retaliation, would suffer from the same problem in some states.[5] On the other hand, Con-

[5] Some states have lengthy limitations periods for wrongful discharge claims, such as New Jersey's six-year period. See *Montells* v. *Haynes*, 627 A.2d 654, 659 (N.J. 1993) (six-year period of N.J. Stat. Ann. § 2A:14-1 (West 1987) applies to actions for economic loss, rather than personal injury, such as a wrongful-discharge cause of action allowing recovery of lost wages).

gress's adoption of a single statute of limitations period applicable both to an action brought by the Attorney General or a *qui tam* relator *and* a retaliation action is consistent with Congress's uniform application of the FCA's procedural provisions to all claims under Section 3730 and increases the likelihood that *qui tam* and retaliation claims would be resolved in the same litigation. See pp. 21-27, *infra*.

Petitioners correctly note (Br. 23) that a plaintiff may have an actionable claim of retaliation "even when there has been no violation of Section 3729." See Senate Report 35 ("[T]he employer would not have to be proven in violation of the False Claims Act in order for this section to protect the employee's actions."). Petitioners point out that the six-year limitations period in Section 3731(b)(1) begins to run from "the date on which the violation of section 3729 was committed," and then argue that because a retaliation action does not depend on an actual violation of Section 3729, retaliation "claims will never be time-barred" under Section 3731(b)(1). See Pet. Br. 22-23. That argument is clearly mistaken. Under petitioners' strained reading, a defendant moving to dismiss even an action under Section 3730(a) or (b) action would likewise first have to prove that a "violation of Section 3729 was committed" before it could successfully move to dismiss on statute of limitations grounds. Plainly, that is not the law.

3. Petitioners' reliance on the alternative limitations period in Section 3731(b)(2) is also misplaced. Subsection (b)(2) provides that an action under Section 3730 is timely if it is brought within:

> 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more

than 10 years after the date on which the violation is committed.

31 U.S.C. 3731(b)(2). Petitioners contend that because there is no "official of the United States charged with responsibility to act" in retaliation cases, Congress could not have intended retaliation claims to come within Section 3731(b) at all. Pet. Br. 10-11. That argument is, too, mistaken.

In essence, petitioners argue that if a particular type of claim would not be covered by Section 3731(b)(2), then, by implication, that type of claim is also excluded from the reach of Section 3731(b)(1). That argument, however, proves too much and suffers the same defect as their Section 3731(c) argument. See pp. 13-14, *supra*. Following petitioners' logic, a *qui tam* action pursuant to Section 3730(b) would also be impliedly excluded from the scope of Section 3731(b): Under the logic of petitioners' argument, because the private employee who learns of the fraud is not an "official of the United States," a *qui tam* suit by that individual is excluded from Section 3731(b)(2), and a *qui tam* claim is therefore *also* impliedly excluded from the scope of Section 3731(b)(1)). But even petitioners disavow such a conclusion. See Pet. Br. 4 ("Section 3731(b) * * * establishes a limitations period for an action * * * under section 3730(a) and * * * under section 3730(b).").[6]

[6] It is not clear that the first two steps in petitioners' syllogism are correct either. First, the lower courts are divided on the meaning of the phrase "official of the United States" in 31 U.S.C. 3731(b)(2). At least two district courts have held, as petitioners contend, that a private employee is not an "official of the United States" when suing as a qui tam relator. See *United States ex rel. Amin* v. *George Washington Univ.*, 26 F. Supp. 2d 162, 170-73 (D.D.C. 1998); *United States ex rel. Thistlethwaite* v. *Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998). On that basis, those courts have held that a qui tam action is not timely under Section 3731(b)(2) if brought within three years of the employee's discovery of the fraud. In contrast, the Ninth Circuit has held that such an employee is an "official of the United States" when suing as a relator because Section 3730(b) authorizes the individual to bring suit on behalf of the United States. See *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1217 & n.8 (9th Cir. 1996).

Second, even if a private employee is not regarded as an "official of the United States" when serving as a qui tam relator, it does not follow that Section 3731(b)(2) is wholly inapplicable to suits by a relator. Section 3731(b)(2) provides an alternative limitations period that is triggered by the date on which someone who is an "official of the United States" knows or has reason to know of facts material to the right of action. If that condition is satisfied, then by the terms of Section 3731(b)(2), it would appear that an action for a violation of Section 3729 could be brought within three years by either the Attorney General or the relator. See *United States ex rel. Colunga* v. *Hercules*, No. 89-CV-954B, 1998 WL 310481 (D. Utah Mar. 6, 1998). Similarly, if the six-year limitations period for a violation of Section 3729 is extended by Section 3731(b)(2) because of the date on which an official of the United States first knew or had reason to know of the violation, that extended limitations period should apply equally to a retaliation action under Section 3730(h).

4. Petitioners also urge the Court to adopt a narrowing construction of Section 3731(b) in order to conform the text to what petitioners believe was Congress's intent, as reflected in the 1986 FCA Amendments' legislative history. Pet. Br. 18-21. It is well settled, however, that the Court does "not resort to legislative history to cloud a statutory text that is clear." *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). In any event, petitioners' argument from legislative history is mistaken. To the extent that history is relevant, it confirms that Section 3731(b) means what it says. See *Connecticut Nat'l Bank*, 503 U.S. at 254.

Petitioners' legislative history argument begins from the mistaken factual premise that "the original drafts of the House and Senate bills to amend the False Claims Act set out the retaliatory discharge provisions as a separate section of the statute (to be codified at 31 U.S.C. § 3734)." Pet. Br. 18. From that faulty premise, petitioners draw the incorrect conclusion that when Congress "moved [the retaliation provision] into 31 U.S.C. § 3730," the failure to amend Section 3731(b) to reflect that change was a mere oversight. Pet. Br. 21.

Such speculation in light of unambiguous text is *legally* irrelevant. See, *e.g.*, *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004). Petitioners' recounting of the history of the 1986 amendments, moreover, contains a significant *factual* error. In the earliest versions of what became the FCA Amendments, Congress placed the retaliation cause of action *within* section 3730. See S. 1562, 99th Cong., 1st Sess. § 4 (Aug. 1, 1985) (original Senate bill, proposing retaliation provision as Section 3730(e)); H.R. 3317, 99th Cong., 1st Sess. § 4 (Sept. 17, 1985) (original House bill, proposing retaliation provision as Section 3730(e)). Moreover, neither of those original bills proposed amending the statute of limitations provision in Section 3731(b), which, prior to the 1986 amendments, provided: "A civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. 3731(b) (1982). Even under these early bills, therefore, the retaliation provision that became Section 3730(h) would have come within the scope of Section 3731(b)'s statute of limitation.

Petitioners are correct that the Senate version of the bill was later revised to move the retaliation provision to a proposed Section 3734. Senate Report 34-35. But the House version of the bill was never modified in that manner. See H.R. 4827, 99th Cong., 2d Sess. § 4 (May 15, 1986); 132 Cong. Rec. 22,332 (Sept. 9, 1986). And, with respect to the retaliation provision, it was the *House* version of the bill, both in substance and placement, that Congress ultimately enacted into law. Compare Pub. L. No. 99-562, § 4, 100 Stat. 3157-3158, with House Report 4 and with Senate Report 34-35. See 132 Cong. Rec. 28,570-28,571, 28,576 (Oct. 3, 1986) (Senate adopting amendment to House version that retained substance of House's retaliation provision and its placement within Section 3730).

Thus, to the extent the legislative history of the 1986 amendments is at all relevant to the Court's inquiry, it indicates that the placement of the retaliation provision in a new

subsection of Section 3730 was not the product of a last-minute switch that might have led Congress to overlook the consequence of bringing it under the FCA's statute of limitations.[7] In any event, what the legislative history of the FCA indisputably does show is that Congress considered a proposal to put the FCA's retaliation cause of action in a separate section, where there would have been no statute of limitations directly applicable to it, but rejected that approach in favor of placing the provision with the FCA's other causes of action within Section 3730, which by the terms of the FCA made it subject to the same rules (including the same statute of limitations) that govern other actions under that Section. Nothing in the legislative history suggests that Congress did not intend what the text of the FCA clearly provides as a result of that choice.

B. A Uniform Limitations Period For All Actions Under Section 3730 Advances Congress's Purposes In The False Claims Act.

Petitioners' argument is, at heart, less that Section 3731(b) *cannot* be applied by its terms to retaliation claims under Section 3730(h), than that, for various reasons of public policy, it *should not* be applied to retaliation claims. Petitioners contend that to provide a six-year limitations period for Section 3730(h) claims, running from the date of the violation of Section 3729, would be inconsistent with statutes of limitations generally and, more particularly, at odds with

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[7] The language of Section 3730(h) provides further evidence that the placement of the retaliation provision within Section 3730 was not an oversight. Section 3730(h) refers to retaliation by an employer based on "lawful acts done by the employee * * * in furtherance of an action under this section, including investigation for * * * an action filed or to be filed under this section." (emphasis added). Those cross-references to actions under Section 3730(a) and (b) show that Section 3730(h) was fully integrated with those provisions. There accordingly is every reason to believe that Congress meant to fully integrate Section 3730(h) with those provisions for purposes of the statute of limitations as well, as the text of Section 3731(b) provides.

other limitations provisions governing retaliatory discharge claims. That argument ignores the unique nature of the FCA. The uniform limitations period provided by Section 3731(b) for all claims under Section 3730 serves the purposes of the FCA, whereas application of other statutes of limitation would frustrate those purposes.

Congress understood well the close relationship between *qui tam* claims and retaliatory discharge claims. As noted above, Congress specifically located the FCA's retaliation provision within Section 3730, with the *qui tam* provision, and limited the prohibition on retaliation claims to ones based on acts taken "in furtherance of an action under this section." 31 U.S.C. 3730(h). In fact, in the House Report, the discussion of the retaliation provision is located under the heading "*QUI TAM* ACTIONS." House Report 22-23. Moreover, as is evident from Congress's establishment of uniform jurisdictional and procedural rules for all "action[s] under section 3730," 31 U.S.C. 3731(a), (b) and (c); 31 U.S.C. 3732(a) and (b), Congress expected that retaliation claims would typically be litigated together with the underlying *qui tam* suit—an expectation that is fully borne out by experience.

In addition to general interests of judicial economy, litigating retaliation and *qui tam* actions together also serves interests particular to the FCA. Because a relator may remain an active participant in a *qui tam* action in which the United States has intervened and assumed primary responsibility for its prosecution, the FCA gives the court special authority to manage the discovery process and thereby ensure that the private individual does not unduly interfere with the government's development of its case. See 31 U.S.C. 3730(c)(2)(C). That type of management coordination would be significantly hampered if the relator's retaliatory discharge claim were proceeding independently of the action under Section 3730(b).

Another important feature of the FCA is that it enables the government to investigate the allegations of fraud before the defendant is aware that it is a target. For instance, the FCA requires that a *qui tam* relator must, simultaneously with filing the complaint under seal, serve a copy on the government, together with a "written disclosure of substantially all material evidence and information the person possesses." 31 U.S.C. 3730(b)(2). The government then has 60 days, which can be extended, to investigate and to decide whether to intervene in the case. 31 U.S.C. 3730(b)(2) and (3). For similar reasons, the FCA requires that, in order to avoid the general jurisdictional bar against *qui tam* suits that are based on already publicly disclosed information, 31 U.S.C. 3730(e)(4)(A), a relator must show that she had "voluntarily provided the information to the Government," 31 U.S.C. 3730(e)(4)(B), in order to permit the government an opportunity to investigate the allegations.[8]

The short limitations periods for wrongful discharge claims under many state laws and other federal statutes would frustrate these purposes. As the six-year limitations provision in Section 3730(b)(1) reflects, Congress understood that, because of the complexity of many Section 3729 violations, it could often take a relatively long time for the government or the relator to discover the possible fraud and then investigate it and prepare to sue. And when the limitations period is extended beyond six years, Congress still allowed three years after the discovery of the fraud to prepare an FCA complaint. See 31 U.S.C. 3731(b)(2) (requiring claims to be brought within "3 years after the date when facts material to the right of action are known"). Because

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[8] The facts alleged in this case exemplify the cooperative approach that the FCA envisions. According to the complaint, respondent reported the allegations of fraud to agents of the USDA OIG, assisted them with their investigation, and refrained from filing a qui tam action until after that investigation was completed without the filing of an FCA claim by the government. J.A. 26-27.

many acts of retaliation will take place soon after a potential relator first suspects and inquires into possible fraud, a short limitations period for retaliation claims would force the employee either to severely truncate her investigation of the fraud claim, so that she could file the two claims together, or to sever the claims and file the retaliation claim first. Some States' analogous limitations periods are as short as 90 days. *E.g.*, *United States ex rel. Hinden*, v. *UNC/Lear Servs., Inc.*, No. Civ. 02-00107 ACK/BMK, 2005 WL 639679, *5-*6 (D. Haw. Mar. 15, 2005) (holding FCA retaliation claim under Section 3730(h) time-barred pursuant to 90-day limitations period of the Hawaii Whistleblowers' Protection Act); *United States ex rel. Tillson* v. *Lockheed Martin Energy Sys., Inc.*, No. Civ. A 5:00CV-39-M & 5:99CV-170-M, 2004 WL 2403114 (W.D. Ky. Sept. 30, 2004) (declining to apply Kentucky's 90-day limitations period for whistleblower actions to claim of retaliation claim under Section 3730(h) in favor of six-year period in Section 3731(b)(1)). Other States also have very short statutory periods for some whistleblower retaliation actions that a court might determine are applicable by analogy. Pet. App. 24a-25a (citing 180-day limitations provisions for certain retaliatory discharge claims under Texas and Ohio law).[9] It may, however, often be exceedingly difficult to prepare a *qui tam* complaint in a complex defense contractor case within 180 days of when the employee was retaliated against. State wrongful discharge periods may, in fact, be so short precisely because a wrongful discharge claim, standing alone, is not particularly difficult to prepare. Indeed, many statutes provide for such an action to be initiated by an informal complaint to an administrative body.[10] Short statutes of limitation applicable to such complaints are not suited to the FCA, in which the retaliation claimant must prepare a formal judicial complaint that in many cases also will include a related *qui tam* claim.

The consequence of the position advanced by petitioners therefore may be that relators would split their retaliation and *qui tam* claims, or perhaps not bring them at all, thereby undermining the purposes of the FCA. If the relator does try to pursue both claims separately, prior disclosure of her allegations in the retaliation suit would undermine the enforcement mechanisms of the FCA. Disclosure of the relator's fraud allegations and the potential false claims suit before the United States has had an opportunity to conduct its own investigation would frustrate the purpose of the FCA's requirement that a *qui tam* complaint initially be filed under seal. Moreover, because the allegations of fraud will have been disclosed in the wrongful discharge action, questions would arise as to whether the employee is then barred from even pursuing a *qui tam* action because of the FCA's public disclosure rule. See 31 U.S.C. 3730(e)(4)(A) (barring *qui tam* action where allegations of fraud have been disclosed in a prior civil hearing); *United States ex rel. King* v. *Hillcrest*

[9] Florida likewise has a short 180-day limitations periods for analogous retaliation claims. See Fla. Stat. Ann. § 68.088 (West 1997) (person retaliated against in connection with a state FCA activity "shall have a cause of action under Section 112.3187"); *id.* § 112.3187(8)(c) (1997 & Supp. 2005) (a claimant "may, after exhausting all available contractual or administrative remedies, bring a civil action in any court of competent jurisdiction within 180 days"). As Florida is the State with the fourth largest volume of defense contracts in the nation, its statute would be particularly important if the Court were to adopt petitioners' arguments in favor of state law limitations periods. See http://www.eflorida.com/keysectors/homelandsecurity/hls.asp?level1=22&level2=142&level3=370&region=tb. Cf. NDIA Br. 17-18 (listing other States with heavy concentrations of government contractors, but omitting Florida).

[10] The Senate Report indicates that, in enacting Section 3730(h), Congress was "guided by" the whistleblower provisions in eight earlier federal statutes. See Senate Report 33. Petitioners emphasize that the longest limitations provision in any of those statutes is 180 days, and seven of the eight allow only 30 days. Pet. Br. 15-16. Those examples, however, are of limited relevance in determining the limitations period applicable to claims under Section 3730(h). Unlike Section 3730(h), each of the whistleblower statutes cited in the legislative history provides that retaliation claims are to be handled by an administrative process in the first instance.

Health Ctr., 264 F.3d 1271 (10th Cir. 2001) (prior wrongful discharge action constituted a "public disclosure" that barred a later *qui tam* suit on behalf of the United States by the same plaintiff), cert. denied, 535 U.S. 905 (2002).[11] In practice, then, petitioners' rule would frequently force employees to choose between filing a retaliation claim alone and filing a premature *qui tam* action.

Congress could have drafted elaborate provisions in an attempt to address these competing incentives. Instead, it chose a simpler approach by making retaliation claims subject to the same limitations rules that govern *qui tam* claims. See 31 U.S.C. 3731(b). Relators therefore have no incentive to bring retaliation claims independent of their underlying *qui tam* claims or to rush their *qui tam* claim to court prematurely.

Moreover, a uniform limitations period for all FCA claims offers the benefit of certainty: *all* claims under the False Claims Act, regardless of the jurisdiction in which the action is brought, are subject to a minimum limitations period of six years under Section 3731(b). There are obvious benefits to such a clear rule, not the least of which is avoiding threshold litigation over which State's limitations periods apply and which of that jurisdiction's provisions is the most closely analogous to a Section 3730(h) retaliation action. See *Jones* v. *R.R. Donnelley & Sons*, 124 S. Ct. 1836, 1842-1843 (2004).[12] In light of Congress's explicit purpose in the 1986 FCA

[11] A relator in such a circumstance might contend that she was the "original source" of the fraud allegations, and thus that the bar against qui tam suits based on publicly disclosed allegations does not apply. See 31 U.S.C. 3730(e)(4)(B). The scope and application of the "original source" exception in turn would create their own uncertainty.

[12] The difficulty of such an endeavor is exemplified by the contradictory assertions of the various courts and amici with respect to the most analogous state limitations periods. Compare NDIA Br. 18 (Florida, unknown; Utah, 1 year; Ohio, 4 years; Texas 2 years); EEAC Br. 17-18 (Florida, 4 years; Utah, 4 years; Ohio, less than 4 years); Pet. App. 24a-25a (Ohio, 180 days; Texas, 180 days); note 9, *supra* (Florida, 180 days).

Amendments to encourage private enforcement of the FCA, see Senate Report 23-24, it understandably chose to adopt a uniform limitations period for all FCA claims, thereby avoiding ambiguity in the applicable limitations period that might deter employees from filing retaliation claims—or even from coming forward at all.[13]

C. The Purportedly Absurd Consequences Petitioners Describe Are Both Hypothetical And Avoidable.

1. Notwithstanding the plain text of the FCA and the evident advantages of a uniform limitations rule for all FCA claims, petitioners argue that Congress could not have intended Section 3731(b) to embrace retaliation claims because, in their view, it would lead to "absurd" results. Petitioners point out that because the limitations period under Section 3731(b)(1) begins to run on the date of the violation of Section 3729, not the date of the retaliatory conduct itself, the six-year period under Section 3731(b)(1) could conceivably expire before the retaliatory acts themselves occur.[14]

Tellingly, however, petitioners and their amici cite only hypothetical examples of such instances, and they do not cite a single case in which such a result has occurred in the

[13] Although petitioners contend (Br. 17) that Congress could not have intended the six-year limitations period to apply to a retaliation action under Section 3730(h) because six years is too long for employment related claims, this Court has recognized that "six years[] is not long enough to frustrate the interest in a 'relatively rapid disposition of labor disputes.'" *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 36 (1995) (citation omitted).

[14] Petitioners cite decisions of this Court to the effect that "[a]ll statutes of limitations begin to run when the right of action is complete." *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875); *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 201 (1997). That is, indeed, the "standard rule" where, for example, Congress states that the limitations period starts to run when "the cause of action arose." *Ibid.* (quoting 29 U.S.C. 1451(f)(1)). But the Court has also made clear that the "standard rule" does not apply if there is a statutory "indication that Congress intended to depart from the general rule." *Ibid.* Here, the text of Section 3731(b) provides an express "indication" of such intent.

nearly two decades that have passed since Congress enacted the FCA Amendments. See Pet. Br. 22-25; NDIA Br. 10-13; EEAC Br. 12-14. Nor is the United States aware of any such example. Surely something more than hypothetical absurdity is required before a clear statutory provision will be discarded. Even if some isolated examples of such instances eventually emerge, their relative rarity demonstrates that the purportedly absurd consequences for potential plaintiffs of which petitioners and the amici FCA defendant organizations are so solicitous may have been appropriately discounted by Congress. Congress is entitled to address itself chiefly to the types of cases that will in the main arise and may appropriately choose clarity and administrability over competing concerns that may arise only in a small number of cases. Cf. *Lamie*, 540 U.S. at 537 (rejecting an absurdity challenge to the plain meaning of a statute in light of the "apparent sound functioning of the [statutory regime] under the plain meaning approach").

2. Finally, as the court of appeals observed, if cases should arise in which the six-year period in Section 3731(b) expires before the employer commits a retaliatory act, traditional principles of equity could be interposed to prevent the cause of action under Section 3730(h) from being time-barred. See Pet. App. 20a-21a; *Neal* v. *Honeywell, Inc.*, 33 F.3d 860, 866 (7th Cir. 1994).

For example, a court could consider whether an employer who sought in bad faith to deny a whistleblowing employee the benefit of Section 3730(h) by purposefully waiting until the limitations period expired to exact revenge, should be barred from relying on the statute of limitations. *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (observing that the doctrine that "no man may take advantage of his own wrong" "has frequently been employed to bar inequitable reliance on statutes of limitations"); *Schroeder* v. *Young*, 161 U.S. 334, 344 (1896) (defendant was "estopped to

insist upon the statutory period" because his conduct had "lulled" the plaintiff "into a false security").

Even without proof of such conduct by the employer, the running of the limitations period for a retaliation action could be deemed to be tolled upon the filing of an action by the Attorney General or a *qui tam* relator under Section 3730(a) or (b), just as the filing of a *qui tam* action automatically renders timely any subsequent intervention by the government, even if an independent action by the Attorney General would be time barred. See *Young* v. *United States*, 535 U.S. 43, 49 (2002) (limitations periods are "customarily subject to 'equitable tolling', * * * unless tolling would be 'inconsistent with the text of the relevant statute'") (citation omitted); *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 552-559 (1974) (claims of putative class members tolled during pendency of class certification because defendants were put on notice); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983). Under that approach, an action could thereafter be brought based on any retaliation against a relator or other employee subsequent to the filing of the *qui tam* complaint for testifying or otherwise assisting in the action while it is still in litigation. Alternatively, if a *qui tam* plaintiff is discharged upon the unsealing of a complaint after the period under Section 3731(b) has run, the court could allow the retaliation claim to relate back to the timely-filed *qui tam* action.

Contrary to the concerns of petitioners and their amici, the prospect of equitable tolling or similar principles being applied to particular FCA retaliation does not create "the prospect of perpetual liability" that "could bankrupt local governments." IMLA Br. 16-17. Of course, the prospect of any liability can be avoided by the simple expedient of refraining from retaliating, and the prospect of "perpetual" liability is foreclosed by the equitable roots of those doctrines. In any case in which an equitable doctrine is raised, the employer could invoke the doctrine of laches if the re-

taliation claim is not filed promptly after the discharge. The defendant's potential liability for back wages in such a situation would likely be less than in some applications of petitioners' theory, in which the discharged employee would, in some States, have up to four, or even six, years after the discharge to bring an FCA retaliation claim. Cf. NDIA Br. 17-18; EEAC Br. 17-18. Indeed, a notable aspect of petitioners' theory is that a retaliation claim could be brought no matter how far in the past the purported fraud had taken place. Under the statute Congress enacted, by contrast, if the employee undertakes an investigation after the time when a *qui tam* suit or action by the Attorney General would be untimely, any retaliation suit would also be untimely. Thus, the limitations period enacted by Congress in Section 3731(b) serves the combination of purposes of this unique statute far better than would the adoption of disparate state law analogues that petitioners urge.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

No. 04-169

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

The Equal Employment Advisory Council and The Chamber of Commerce of the United States respectfully submit this brief as *amici curiae* with the consent of the parties. The brief urges reversal of the Fourth Circuit's decision below, and thus supports the position of Petitioners Graham County Soil & Water Conservation District, *et al.*[1]

[1] Counsel for *amici curiae* authored this brief in its entirety. No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation of this brief.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 330 of the nation's largest private sector corporations, collectively employing over 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States ("the Chamber") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

All of EEAC's members and many of the Chamber's members are employers subject to federal employment statutes and regulations. Most of EEAC's member companies and many of the Chamber's members do business nationwide, and many are federal contractors covered by the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733. Collectively, EEAC's and the Chamber's member companies routinely make and implement millions of employment decisions each year, including hires, promotions, transfers, disciplinary actions, terminations, and other employment actions. They devote extensive resources to training, awareness, and compliance

programs designed to ensure that all of their employment actions comply with applicable legal requirements.

Members of EEAC and the Chamber have an ongoing, substantial interest in the application of an appropriate statute of limitations for employees' claims that they were retaliated against for engaging in activity protected by the FCA. Statutes of limitations serve an important function in our legal system—to prevent the filing of stale claims, where witnesses and documents may be long gone. The Fourth Circuit Court of Appeals applied a statute of limitations that far exceeds the statute of limitations for any other retaliation or whistleblower claim created by Congress and the overwhelming majority of states. This was based on an improper reading of the FCA. The result is that employers will have to defend untimely claims long after witnesses and documents have become unavailable.

EEAC and the Chamber seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the Court's attention relevant matters that the parties have not raised. Because of its experience in these matters, EEAC and the Chamber are well situated to brief the Court on the concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

Karen Wilson, a former part-time secretary at the Graham County Soil & Water Conservation District in North Carolina, resigned on March 7, 1997. Pet. App. 2a-3a. Nearly four years later, Wilson brought a *qui tam* action under the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, alleging that her coworkers had submitted false claims to the federal government in violation of the FCA and that she was constructively discharged for reporting these activities in

violation of the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h). Pet. App. 3a.

Graham County moved to dismiss Wilson's retaliation claim on the ground that it was barred by the applicable statute of limitations, which was three years under North Carolina law. *Id.* Agreeing that the six-year statute of limitations for *qui tam* actions under 31 U.S.C. § 3731(b)(1) does not apply to whistleblower retaliation cases, the district court applied North Carolina's three year statute of limitations, and granted the motion. *Id.* Wilson appealed to the Fourth Circuit Court of Appeals. Pet. App. 4a.

The Fourth Circuit reversed the district court's order in a 2-1 decision. Pet. App. 28a. The Fourth Circuit focused on the language of Section 3731(b)(1), which provides that "a civil action under 31 U.S.C. § 3730 may not be brought more than 6 years after the date on which the violation of 31 U.S.C. § 3729 is committed . . . ." Even though Section 3729 only addresses submitting false claims to the government, and does not address the retaliatory conduct described in Section 3730(h), the Fourth Circuit applied Section 3731(b)'s 6-year statute of limitations for violations of Section 3729, because the plain language of Section 3731(b) refers to actions brought under Section 3730(h). Pet. App. 13a. In so doing, the Fourth Circuit expressly rejected the analysis of the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998), which had applied California's one-year statute of limitations to a retaliation claim under the FCA, and adopted the rationale of the Seventh Circuit in *Neal v. Honeywell*, 33 F.3d 860 (7th Cir. 1994).

In his dissent in this case, Judge J. Harvie Wilkinson III argued that "the answer is not so simple." Pet. App. 30a. The limitations period in Section 3731(b)(1) refers to six years after the date on which the violation of Section 3729 is committed. *Id.* Thus, Judge Wilkinson contended, "[t]he six-year period is tied to a violation of § 3729, and nothing

else." Pet. App. 31a. An employer could, he aptly theorized, retaliate against an employee for engaging in protected activity even if there has been no Section 3729 violation—leaving the statute of limitations without a starting point. *Id.* Typically, Judge Wilkinson said, limitations periods for actions for retaliation commence with the retaliatory act. Pet. App. 35a. There is no logical basis for tying the limitations period to the date on which the false claim violation itself took place, when a civil action arising under Section 3730(h) stems from the separate and distinct act of retaliating against an employee for reporting the false claim. Pet. App. 35a-36a.

Graham County sought a writ of *certiorari*, which this Court granted.

SUMMARY OF ARGUMENT

The Fourth Circuit's interpretation of 31 U.S.C. § 3731(b)(1) to apply the statute of limitations for false claim actions to retaliation actions under the False Claims Act is based on an incorrect reading of the statute, and has the potential to significantly diminish both a whistleblower's attempts to bring retaliation claims and an employer's ability to defend claims that have gone stale.

Section 3731(b)(1)'s six year statute of limitations should not be applied to retaliation claims under the False Claims Act because the statute and legislative history demonstrate that it was intended to apply only to claims where fraud in violation of § 3729 is alleged. Section 3731(b)(1) does not apply to retaliation claims because there is no need to show a violation of § 3729 to sustain a retaliation claim. As Judge Wilkinson notes in his dissent, the only way that Section 3731(b)(1) would apply to retaliation claims would be to "lop[] off" the part of the statute that ties retaliation claims to the date an alleged false claim occurred. Pet. App. 30a.

Applying a statute of limitations for retaliation claims that is unrelated to the retaliatory conduct will lead to absurd results that could frustrate the purpose of the FCA. As Judge Wilkinson states, the Fourth Circuit's decision goes to "extraordinary lengths" to resist the "thoroughly ordinary principle" that the statute of limitations for a retaliation claim should begin to run on the date of the retaliatory act, not an unrelated act. Pet. App. 36a. Tying the statute of limitations to a false claims violation could effectively deprive employers of any statute of limitations protection where no false claims violation is established, because the statute would never start to run. In addition, applying a statute of limitations that begins with a false claim instead of the retaliatory act will leave some whistleblowers without legal recourse.

Even where a retaliatory act occurs in the same time frame as the false claim, applying a six year statute of limitations to retaliation claims is contrary to the public policy behind statutes of limitations and would force employers to litigate stale claims. This Court has long recognized that statutes of limitations were created to balance plaintiffs' rights to pursue claims with defendants' rights to be free from defending stale claims. *E.g.*, *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Federal and state legislatures have almost universally established statutes of limitations for comparable retaliation and whistleblower claims that are well under six years, with most federal statutes of limitations for retaliation claims set at six months or less, and most state statutes of limitations for retaliation claims set at two years. In the fast-paced and ever-changing employment environment, a protracted six-year statute of limitations will seriously and unfairly impede an employer's ability to defend stale FCA retaliation claims.

ARGUMENT

I. THE FALSE CLAIMS ACT'S SIX YEAR STATUTE OF LIMITATIONS FOR FRAUD CLAIMS DOES NOT APPLY TO RETALIATION CLAIMS BECAUSE THE STATUTE AND LEGISLATIVE HISTORY DEMONSTRATE THAT CONGRESS INTENDED THE SECTION TO APPLY ONLY TO CLAIMS ALLEGING FRAUD IN VIOLATION OF SECTION 3279

A. Section 3731(b)(1)'s Six Year Statute Of Limitations Does Not Apply To Retaliation Claims By Its Terms And Because A Retaliation Claim Does Not Require Alleging Or Proving A Section 3729 Violation

The federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes a private person, including current and former employees, to sue any person who submits false bills to the United States for payment. The FCA is the primary weapon in fighting fraud against the federal government. S. Rep. No. 99-345, at 2 (1986) (hereinafter "S. Rep."), *reprinted in* 1986 U.S.C.C.A.N. 5266.

The FCA was rarely used in recent years until 1986, when Congress amended it to provide individuals with significant monetary incentives to file suits. S. Rep. at 1-2, 1986 U.S.C.C.A.N. at 5266-67. The 1986 revisions to the FCA also added a whistleblower protection section to prohibit retaliation against employees who report their employers for suspected violations of the Act or who help the federal government prosecute their employers. The law protects an employee who investigates, initiates, testifies for or assists in such an action. 31 U.S.C. § 3730(h).

While the language of Section 3731(b)(1) of the Act plainly requires that a fraud case under the FCA be brought within six years of the violation, the same is not true for

whistleblower retaliation cases. Nonetheless, in this case, the Fourth Circuit ruled that the six-year limitations period applies to those cases. Pet. App. 13a. The language of Section 3731(b)(1) cannot be fairly read to apply to retaliation claims, however, because it explicitly applies only to violations of Section 3729, namely, civil actions that allege fraud against the government.

Section 3731(b)(1) provides that "a civil action under 31 U.S.C. § 3730 may not be brought more than 6 years after the date on which the violation of 31 U.S.C. § 3729 is committed . . . ." 31 U.S.C. § 3731(b)(1). Section 3729 defines the scope of liability for presenting a false claim to the government. However, only two of the three causes of action under Section 3730 actually address a violation of Section 3729—Section 3730(a), which applies to false claims brought by the Attorney General, and Section 3730(b), which applies to *qui tam* fraud actions brought by individuals. "Because an anti-retaliation claim does not involve a 'violation of section 3729' but instead a violation of section 3730(h), by its own terms section 3731(b)(1) cannot apply." Pet. App. 31a (Wilkinson, J., dissenting).

As Judge Wilkinson points out, the Fourth Circuit's application of Section 3731(b)(1) to retaliation claims "lops off half the statute." Pet. App. 30a (Wilkinson, J., dissenting). While the first part of Section 3731(b)(1) would appear to apply to retaliation claims, the second part does not. A false claim *may* be alleged at the same time as a retaliation claim, but decisions under the FCA have made clear that a retaliation claim can be brought where a *qui tam* fraud action has been unsuccessful or not even filed. *E.g.*, *Fanslow v. Chicago Mfg. Ctr., Inc.*, 384 F.3d 469, 479 (7th Cir. 2004) ("A plaintiff may proceed under subsection (h) independently of a *qui tam* action."); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 238 n.23 (1st Cir.) ("A retaliation claim under 31 U.S.C. § 3730(h) does not require a

showing of fraud"), *cert. denied*, ___ U.S. ___, 125 S. Ct. 59 (2004). Thus, the language of Section 3731(b)(1) itself demonstrates that the 6-year limitations period was not intended to apply to retaliation claims.

B. The Legislative History Of The False Claims Act Shows That Congress Intended The Six-Year Statute Of Limitations To Apply Only To False Claims Actions

While the plain language of Section 3731 reveals that it does not apply to retaliation claims under the FCA, the legislative history of the Act also demonstrates that Congress intended the six-year statute of limitations to apply only to false claims. As the Ninth Circuit observed in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998), before the FCA was amended in 1986 to add its anti-retaliation provision, Section 3731(b) stated that a civil action under Section 3730 must be brought within six years from the date that "the violation" is committed. At the time, the only violations under the FCA involved the presentation of false claims to the government. When the FCA was amended, it added a new violation to Section 3730 (subsection (h)), retaliation against an employee who engages in protected activity. If Congress had not also amended the language of Section 3731(b), the 6-year statute of limitations would have clearly applied to actions under subsection (h). However, Congress narrowed the scope of Section 3731(b) to "violations of Section 3729," the section that specifically and strictly addresses false claims, not retaliation claims. *Lujan*, 162 F.3d at 1035. Congress' alteration of the language to cover only a "violation of § 3729" demonstrates that Congress intended the six-year statute of limitations to apply only to false claims cases and not to cases involving the newly-created retaliation claims.

While the Fourth Circuit suggested that the date of retaliation may be difficult to ascertain, Pet. App. 14a, the date of a retaliatory act, which involves a tangible employment action such as a termination, is normally easily determined. *See Moore v. California Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 847-48 (9th Cir. 2002) (holding that behavior does not constitute retaliation under the FCA "unless it would be sufficient to constitute an adverse employment action under Title VII"). As the Ninth Circuit observed "[t]here is nothing covert or deceptive about retaliation-the victim feels its sting immediately." *Lujan*, 162 F.3d at 1035.[2]

Because the statute of limitations in Section 3731 does not apply to retaliation claims under the FCA, and the FCA does not provide for any other statute of limitations, "Congress intended that the courts apply the most closely analogous statute of limitations under state law." *Id.* (quoting *Reed v. United Transport Union*, 488 U.S. 319, 323 (1989)). The most closely analogous statute of limitations under North Carolina law is the three-year period applicable to claims of wrongful discharge. N.C. Gen. Stat. § 1-52(5).

II. TYING THE STATUTE OF LIMITATIONS FOR RETALIATION CLAIMS TO FCA VIOLATIONS COULD DENY EMPLOYERS THE PROTECTIONS OF A LIMITATIONS PERIOD IN CERTAIN CASES AND LEAVE EMPLOYERS FREE TO RETALIATE AGAINST WHISTLEBLOWERS IN OTHERS

The Fourth Circuit's application of Section 3731(b)(1) to retaliation claims creates an illogical situation where the

[2] In addition, as the Petitioners demonstrated in their Petition for Writ of Certiorari, at 22-25, debate on the floor of Congress showed that Congress was concerned with creating a six-year statute of limitations to protect the United States' right to bring false claim actions, not an employee's right to bring retaliation actions.

statute of limitations is not tied to the action it seeks to punish. As Judge Wilkinson said:

> The matter seems almost second-nature. Statutes of limitations for personal injury claims begin to run on the date of the injury. Statutes of limitations for wrongful discharge claims begin to run on the date of the discharge. . . . I am unable to understand why my friends in the majority go to such extraordinary lengths to resist such a thoroughly ordinary principle.

Pet. App. 36a (Wilkinson, J., dissenting). Even though a retaliation claim can be brought where a fraud action has been unsuccessful or not even filed, the Fourth Circuit's decision starts the clock for a retaliation claim based on when a false claim occurred. In some situations, the result will be an unclear or non-existent statute of limitations.[3]

A. By Pegging The Statute Of Limitations To A False Claims Violation, Employers May Be Effectively Deprived Of Any Statute Of Limitations Protection Where No False Claims Violation Is Established

Courts have interpreted the FCA's definition of protected activity to include more than just allegations that an employer submitted false claims. An employee is also protected by the FCA when he collects information about *possible* fraud. *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1260 (D.C. Cir. 2004); *United States ex. rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 740 (D.C. Cir. 1998). This investigation could lead to a retaliation claim, even if the employee determines that no fraud occurred. For example, an employee who suspects that bills submitted to the government were false may investigate and determine that

[3] Although these are all hypothetical situations, they are based on case law that has been developed in the less than twenty years that the FCA has allowed retaliation claims.

they were valid, leaving him or her with no basis for a false claim action under the FCA. However, that employee could bring a retaliation claim under the FCA for a virtually unlimited period thereafter, and the employer would be deprived of any statute of limitations protection, because under the Fourth Circuit's analysis, the statute would have never even started to run.

B. When The Case Remains Under Seal Until After The Statute Of Limitations Has Run Or The Employer Waits Until The Period Has Run To Retaliate, A Whistleblower's Retaliation Claim Will Be Time Barred Before The Retaliation Has Even Occurred

Using the date of a false claim rather than that of a retaliatory act to begin the limitations period also may pose problems for whistleblowers because of the unique nature of FCA claims. While typical retaliation claims have a close temporal relationship between a protected act and the retaliatory conduct based on them; that is not necessarily the case under the FCA. Section 3730(b)(2) provides that a false claim action brought by an individual must be filed under seal, and is not served on the defendant until ordered by the court. 31 U.S.C. § 3730(b)(2). Although the seal must last at least 60 days, it is not uncommon for the Department of Justice to keep cases under seal for years while it investigates and determines whether to join in the suit. For example, in *Williams*, the government took five years before it chose not to intervene in a false claim and retaliation action brought by a whistleblower. 389 F.3d at 1255. If a case is unsealed after six years, and an employee is fired the next day, the Fourth Circuit's reading of the FCA will leave him with no recourse. As a result, the filing of cases under seal creates the possibility that an employer will not even become aware of a whistleblower's complaint until the limitations period has expired, leaving the employer free to retaliate.

The Fourth Circuit's disconnect between the retaliatory act and the statute of limitations actually allows the whistleblower's employer to delay taking retaliatory action until after the limitations period has run, knowing that the whistleblower will then have no legal recourse. In contrast, where the statute is tied to the retaliatory conduct, as is the norm, the employee can seek recourse immediately, without fear of the statute having already expired. The employer even could put pressure on another employer to retaliate against a whistleblower. In *Nguyen v. City of Cleveland*, 121 F. Supp.2d 643, 644 (N.D. Ohio 2000), the City of Cleveland found out that a former employee had filed a *qui tam* action prior to leaving after the claim was unsealed. The City then put pressure on the whistleblower's current employer, a city contractor, to remove him from city contracts, leading to his termination. *Id.* at 644-45. Although the district court held that both the former and current employer could be liable for retaliation in that case, *id.* at 648-49, the City simply could have waited until the six years had run and pressured the contractor to terminate Nguyen with impunity under the Fourth Circuit's interpretation of the FCA. There are a number of other bizarre scenarios resulting from the Fourth Circuit's decision to replace the ordinary starting date for a retaliation claim with an unrelated one. For example, a whistleblower may first discover fraud more than six years after it occurred, and report it to the government. In that situation as well, the employee then could be terminated in retaliation for his report and yet have no recourse.

While the Fourth Circuit acknowledges that results such as the ones described above could occur, it concluded that the statute of limitations for retaliation claims is tied to the date that a false claim occurred because Congress intended to create a statute of repose for "simplicity of administration." Pet. App. 19a. The Fourth Circuit further suggests that these problems can be solved through the application of equitable tolling or equitable estoppel by the courts. Pet. App. 20a-21a.

There is no indication from the legislative history that Congress intended to create a statute of repose, however, and it is unreasonable to believe that an Act that was amended to prevent undetected, pervasive fraud in government contracting[4] potentially would leave those who report fraud without legal recourse in order to allow for "simplicity of administration."[5]

Furthermore, if the Fourth Circuit is correct in asserting that this is a statute of repose, then equitable tolling will not be available to provide relief to whistleblowers, even if there has been active fraud to prevent them from filing claims. *See, e.g., First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 865-66 (4th Cir. 1989) ("a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body") (citation omitted).[6] As a result, the Fourth Circuit's insistence on starting the limitations period with a false claim instead of a retaliatory act potentially could leave without recourse whistleblowers who are blatantly retaliated against. This cannot be what Congress intended when it amended the FCA.

[4] *See* S. Rep. at 1-2, 1986 U.S.C.C.A.N. at 5266-67.

[5] As Judge Wilkinson states, "it is startling for the majority to suggest that Congress was bent, in the FCA no less, on establishing 'repose' for employers who first defrauded the government and then moved against the very persons who brought that fraud to light." Pet. App. 34a-35a (Wilkinson, J., dissenting).

[6] Even if equitable tolling were available, "[r]eliance on equitable tolling . . . undermines the value of having a statute of limitations in the first place and vests courts with unpredictable discretion . . . ." Pet. App. 37a (Wilkinson, J., dissenting).

III. APPLYING A SIX YEAR STATUTE OF LIMITATIONS TO RETALIATION CLAIMS WOULD BE CONTRARY TO THE PUBLIC POLICY BEHIND STATUTES OF LIMITATIONS AND FORCE EMPLOYERS TO LITIGATE STALE CLAIMS

A. Statutes Of Limitations Were Created To Balance Plaintiffs' Rights To Pursue Claims With Defendants' Rights To Be Free From Defending Stale Claims

Allowing an employee six years to file a retaliation claim forces employers to defend stale claims after memories have faded, and relevant witnesses and documents likely have disappeared. This Court has long recognized that statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (citations and internal quotations omitted). While affording plaintiffs with what the legislature deems a reasonable time to present their claims, "they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* (citations omitted).

This Court also has recognized the purpose that statutes of limitation serve in employment cases: to guarantee the protection of employment laws to employees who promptly assert their rights while also protecting employers from "the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980) (citing *Johnson v. Railway Express*

Agency, Inc., 421 U.S. 454, 463-64 (1975)); *see also Early v. Bankers Life and Cas. Co.*, 959 F.2d 75, 80-81 (7th Cir. 1992) ("The short statutes of limitations in employment cases have a purpose--both backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved--and it is ill served when the employer does not receive prompt notice of the dispute") (citation omitted). Public policy requires a balance between the need to protect whistleblowers with the need to protect employers from stale retaliation claims.

B. Federal And State Legislatures Have Recognized That Statutes Of Limitations For Retaliation And Whistleblower Claims Should Be Substantially Shorter Than Six Years In Order To Prevent The Prosecution Of Stale Claims

Legislatures determine the proper period for a statute of limitations by making "'a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.'" *Ricks*, 449 U.S. at 260 (1980) (quoting *Johnson*, 421 U.S. at 463-64). Nearly every time a federal or state legislature has had to make this value judgment, it has determined that the statute of limitations for retaliation claims should be substantially shorter than six years.

1. Most Federal Statutes Of Limitations For Retaliation Claims Are Six Months Or Less

Whenever Congress has had to determine the appropriate period for a statute of limitations for whistleblower claims, it has almost always restricted the period to six months or less. *See* Petition for Writ of Certiorari, at 11-12 and n.1. In addition to the statutes of limitations cited in the Petition for Writ of Certiorari, Congress has limited the filing period in employment discrimination and retaliation cases to less than a

year. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for example, Congress imposed a dual scheme of time limits. First, it provided that a person alleging an unlawful employment practice must file a timely administrative charge within 180 or 300 days after the occurrence of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e)(1).[7] Second, Congress specified that an individual claiming to be aggrieved under Title VII has 90 days within which to bring a civil action after receipt of a "notice of right to sue" from the EEOC pursuant to 29 C.F.R. § 1601.28. 42 U.S.C. § 2000e-5(f)(1). Congress later made these same time limits applicable to proceedings under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, and applied a similar 90 day limit to actions under the Age Discrimination in Employment Act, 29 U.S.C. § 626(e). No other federal whistleblower or employment retaliation statute has created a statute of limitations as long as six years.

2. Most State Statutes Of Limitations For Retaliation Claims Are Two Years

Of the 50 state legislatures that have had to determine the point at which the interests in protecting valid retaliation claims are outweighed by the interests in prohibiting the prosecution of stale ones, only one state has determined that that point is at six years. In fact, our research indicates that most state personal injury statutes of limitations are only two years.[8] Only six states have set the limit at four or more years

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[7] The time-limit is 300 days in "deferral" states (*i.e.*, states having their own agencies with authority to grant or seek relief from the alleged employment practice), and 180 days in non-deferral states.

[8] *See generally* American Law of Products Liability 3d § 47:2 (Jan. 2004).

(Florida, Maine, Missouri, Nebraska, Utah, and Wyoming),[9] and only Maine has a six year statute of limitations. Thus, in the vast majority of states, the Fourth Circuit's decision will substantially increase the number and potential scope of stale retaliation claims that can be litigated.

C. A Six-Year Statute Of Limitations Will Result In An Enormous Burden On Employers To Defend Stale Claims After Witnesses And Documents Have Become Unavailable

Creating a statute of limitations for FCA retaliation claims that is so much longer than the ordinary statute of limitations for employment claims will substantially limit employers' ability to defend claims. In today's business world, rapid change and worker mobility are the orders of the day, and both litigants and fact-finders are likely to confront serious obstacles when faced with claims based on workplace events dating back six years. In the twelve month period ending in August 2004, for example, the turnover rate in the private sector was 25.1 percent. Employment Policy Found., Fact Sheet–Employee Turnover Is Expensive (Oct. 22, 2004)[10]. In this environment, an interval of six years can be like an eternity. Companies change hands. Operations are restructured. Employees leave to go to other companies, other industries, and even other parts of the world. And of course, even when witnesses are available, memories fade over such a long period.

In addition, employment records may disappear or become unavailable over a six-year period. Federal employment

[9] *See* Fla. Stat. § 95.11(3)(o); Me. Rev. Stat. tit. 14, § 752; Mo. Rev. Stat. § 516.120(4); Neb. Rev. Stat. § 25-207; Utah Code Ann. § 78-12-25; Wyo. Stat. Ann. § 1-3-105.

[10] *Available at* http://www.epf.org/pubs/newsletters/2004/fs20041022.pdf.

record-keeping regulations reflect at least some recognition by the employment law enforcement agencies of the burdens associated with keeping employment records for inordinately long periods of time. Thus, they generally limit mandatory record-retention periods, except insofar as they are relevant to pending administrative charges or lawsuits. In general, federal employment record-keeping regulations require employers to maintain documents for, at most, three years.[11] Under the applicable regulation of the federal Equal Employment Opportunity Commission (EEOC), the federal agency that enforces most federal anti-discrimination laws, the mandatory retention period for most employment records is one year. 29 C.F.R. § 1602.14. The Fourth Circuit's decision effectively requires employers to save all employment records for at least six years, even where no lawsuit has yet been filed. This would at least double the amount of time that current records are required to be kept, and add enormously to the record-keeping burden already faced by employers.

While the plaintiff will have personal knowledge of events, allowing her to prove the elements of a retaliation cause of action, the lack of witnesses and records after six or more years will make it extremely difficult for an employer to reconstruct events and mount a defense to a number of the elements of a retaliation claim under the FCA.[12] For

[11] For example, the Age Discrimination in Employment Act requires employers to maintain payroll records for three years and other personnel records for one year (29 C.F.R. §§ 1627.3(a), 1627.3(b)); the Fair Labor Standards Act of 1938 requires employers to maintain pay related records for three years (29 C.F.R. § 516.5(a)); the Family and Medical Leave Act of 1993 requires employers to maintain certain employment records for three years (29 C.F.R. § 825.500).

[12] To prevail on a retaliation claim, a plaintiff must show that she was engaged in a protected activity; that the employer had knowledge of the employee's activity and had either explicit or implicit notice that the activity could result in a FCA complaint being filed; and that the dis-

example, an employee could satisfy his duty to prove that the employer had knowledge of his protected activity by claiming that he notified the employer of the possibility of an FCA claim verbally six years earlier. If the employer's representatives who could rebut this claim are no longer available, it will be difficult for the employer to disprove this element. In addition, it will be difficult to prove or disprove the employer's motivation in making the allegedly retaliatory decision without the availability of relevant witnesses, significantly complicating the issue of causation and the mixed motive defense.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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crimination that she suffered was caused as a result of the protected activity. *See, e.g., Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861 (4th Cir. 1998).

(5)

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In The
Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL. KAREN T. WILSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL LEAGUE OF CITIES IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a nonprofit professional organization that serves as a resource for local government attorneys. IMLA is an advocate for the nation's local governments, and provides its 1,400 members with information about and solutions to the legal issues facing local municipalities.

The National League of Cities (NLC) represents more than 18,000 United States cities, villages, and towns. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance, and to serve as a national resource and advocate for the municipal governments it represents.

Together these organizations represent the interests of local governments throughout the United States. This Court recently held that local governments may be sued under the False Claims Act. *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119 (2003). IMLA and NLC therefore have an immediate interest in whether the six-year limitations period applied by the False Claims Act to *qui tam* and federal government actions based on an employer's fraud and deceit applies as well to individual claims of retaliation against whistleblowers. Resolution of this question is vitally important to all employers, but especially to local governments with limited resources and complicated civil service regulatory schemes, who face the

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[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief.

prospect of extended periods of liability for double back pay and reinstatement with seniority under 31 U.S.C. § 3730(h).

STATEMENT OF THE CASE

IMLA and NLC adopt the Statement of the Case set forth in the Brief for Petitioner.

SUMMARY OF ARGUMENT

This case illustrates how statutory ambiguity can lead to absurd results. In 1986, Congress amended § 3730 of the False Claims Act, 31 U.S.C. § 3729 *et seq.*, to add, among other things, a cause of action for retaliation when an employer discharges or discriminates against a whistleblower who has initiated or assisted with the prosecution of a false claims action. As a result, § 3730 now authorizes two types of private actions under the False Claims Act: (1) *qui tam* actions by private individuals brought as relators on behalf of the United States based on violations of § 3729 of the Act (subject to specific procedural requirements) and (2) individual retaliatory discharge claims based on specific misconduct directed towards the individual (not subject to the same unique procedures).

Until 1986, § 3731 of the Act applied a six-year statute of limitations to all actions under § 3730 – which originally did not refer to retaliation. Once the retaliation provision was enacted, Congress amended § 3731 to state that the limitations period applies only to claims based upon "a

violation of § 3729," and accordingly, the limitations period begins to run from the date of the § 3729 violation. 31 U.S.C. § 3731(b)(1). Section 3731 is silent as to the limitations period for retaliatory discharge claims.

The Fourth Circuit, relying on a decision from the Seventh Circuit, held that the six-year limitations period that applies to false claims actions in general should also apply to actions for retaliatory discharge. Because the six-year period provided in § 3731(b) runs from the date of the § 3729 violation, the Fourth Circuit acknowledged that some employee claims could be barred even before an act of retaliation occurs. Conversely, other employees suffering retaliation will have an incentive to wait until near the end of the six-year limitations period to file suit in order to recover as much double back pay as possible. The Fourth Circuit reached this result despite the fact that its interpretation puts the False Claims Act's retaliatory discharge provisions at odds with every other retaliatory discharge and whistleblower statute, and despite the fact that its ruling is at odds with the universally accepted rationale that the public interest is served by shorter, rather than longer, limitations periods for claims involving reinstatement and back pay.

The public interest simply is not served by extending the period that employers, and public employers in particular, can be subject to claims for *double* back pay with interest and reinstatement *with seniority*, as required under the False Claims Act. An extended period of time in which damages can mount and existing employees can gain seniority would overtax limited local resources and complicate an already complex process of civil service employment and advancement. Thus, the only reading of § 3731 that is consistent with Congressional intent and

the public interest is that retaliatory discharge claims under § 3730(h) accrue at the time of the retaliatory conduct and are subject to applicable state statutes of limitations for such actions.

ARGUMENT

A. The Fourth Circuit's Interpretation of the False Claims Act Would Cause Local Governments to Suffer Widespread and Unique Harm Contrary to the Public Interest.

In *Cook County, Illinois v. United States ex rel. Chandler*, 538 U.S. 119 (2003), this Court held that local governments and municipal corporations are "persons" within the meaning of the False Claims Act. That ruling exposed more than 87,000 local governments to claims under the False Claims Act. *See* U.S. Bureau of Census, Federal, State and Local Governments, 2002 Census of Governments, *Preliminary Report No. 1*, July 2002 *available at* http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf (as of 2002, there were nearly 87,900 local governments in the United States, including over 3,000 county governments, over 19,400 municipal governments, over 16,500 townships, over 13,500 school districts and over 35,100 special districts).

Local governments account for a large percentage of full-time employers in the United States; as of July 2003, there were approximately 11.569 million full-time equivalent local government employees, including employees in the education system and hospitals. *See* U.S. Bureau of Census, *Local Government Employment and Payroll*, March 2003, *available at* http://ftp2.census.gov/govs/apes/03locus.txt. The U.S. Department of Labor, Bureau of Labor Statistics reported that in 2003, local governments accounted for 10.5% of total United States full-time employment (by contrast, state governments accounted for only 3.5% and federal government for only 2.2% of full-time employment). U.S. Department of Labor, Bureau of Labor Statistics, *Industry at a Glance*, December 29, 2004, *available at* http://www.bls.gov/iag/government.htm.

Meanwhile, private False Claims Act filings are mushrooming. In 1987, only 33 relators filed *qui tam* False Claims Act suits. *See* John T. Boese, *Civil False Claims and Qui Tam Actions*, Appendix H, at H-1 (2d ed. 2002). By 1999, the annual total had grown to 481. *Id.* Between 1986 and 2001 *qui tam* relators received $745 million in bounties under the False Claims Act. *Id.* And because local governments administer and participate in so many federal programs, their exposure to potential False Claims Act suits is exponential as compared to private employers subject to the Act. *See Chandler*, 538 U.S. at 129 (observing that "local governments are commonly at the receiving end of all sorts of federal funding schemes. . . . "). Thus, the number of public employers affected by the decision in this case cannot be understated.

In cases involving both public and private employers, courts have acknowledged the importance of limiting the time that plaintiffs have to file employment-related claims. *See, e.g., Williams-Guice v. Board of Educ. of City of Chicago*, 45 F.3d 161, 162 (7th Cir. 1995) ("Claims arising out of employment generally are handled by short periods for action, because back pay is mounting (and because the injury, such as a discharge, is so apparent that it does not overtax anyone to require prompt action).");

Rogan v. Giant Eagle, Inc., 113 F. Supp. 2d 777, 788 (W.D. Pa. 2002) ("The short statutes of limitations in employment cases have a purpose – both backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved. . . . ") (*quoting Early v. Bankers Life and Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992) (*citing Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980))). For example, the Seventh Circuit has long recognized that

> [l]itigation about hiring, firing, and the assignment of work has more urgency about it. If a person is fired, someone else is likely to be given the work. Litigation may require the employer to pay twice for the same work. . . . If the litigation also produces an order to reinstate a wronged employee, or to hire a wronged applicant for work, this may cause loss to other innocent employees. [citations omitted] Disputes of this sort should be filed quickly and litigated briskly in order to hold to a minimum unnecessary loss to [the] employer and other employees – loss that ultimately must lead to lower wages for all employees.

Smith v. City of Chicago, 769 F.2d 408, 412-13 (7th Cir. 1985).

The impact of an extended period of liability for back pay when public employees are involved is of particular concern. The past five years have seen monumental changes in the level of responsibility (fiscal and physical) that must be borne by localities. In the wake of 9/11, local governments, as first responders and law enforcers, have been required to work with the Department of Homeland Security to improve local security and responsiveness in the event of another terrorist attack. *See* U.S.

Department of Labor, Bureau of Labor Statistics, *Career Guide to Industries, State and Local Government (Excluding Education and Hospitals)*, Feb. 27, 2004, at 1, *available at* http://www.bls.gov/oco/cg/cgs042.htm ("Local government employs more than three times as many service workers than does State government; most are firefighters and law enforcement workers."). And while the demand for local government services has increased, employment growth has been "dampened by budgetary constraints due to a slower growing economy, reductions in Federal aid, especially at the county level, and resistance from citizens to tax increases." *Id.* Indeed, the National League of Cities has recently reported that three of five cities are less able to meet their fiscal obligations and that local governments are facing critical fiscal problems due to increased costs for public safety, homeland security, and other federal mandates coupled with reductions in state aid to local governments. *Nation's Cities Weekly*, Vol. 27, No. 39, Sept. 27, 2004. Thus, double back pay awards, which compound with time, threaten local budgets.

Deepening local fiscal problems are not the only compelling reason why shorter periods of limitations for retaliation claims benefit the public. Local government employers are not in the same position as private employers regarding the types of personnel decisions that can be made. Local governments, unlike private employers, face § 1983 claims in personnel actions. Public employers also face unique obstacles when it comes to reinstatement, particularly with seniority. State civil service laws prescribe in detail criteria for hiring, placement, seniority, and discharge. Local governments cannot simply displace an existing employee in favor of a returning employee, nor

can they readily fund such positions. Creating and funding a position for an employee returning after a decade's absence could create new liabilities with respect to the rights of other public servants who have earned seniority during that time.

This Court need look no further than this case for a compelling example of the tremendous burden the Fourth Circuit's application of the six-year statute of limitations would place on public employers. Relator Karen Wilson alleges that she was constructively discharged in March 1997 because she was involved in reporting certain allegedly fraudulent claims made by her employer, the Graham County Water & Soil Conservation District. But she waited four years to bring this *qui tam* action and her action for wrongful discharge. If this Court affirms the Fourth Circuit, Ms. Wilson will return to the district court to prove her retaliation claim. If she is successful, and no appeal is taken, the Graham County District will have to pay her as much as ten years of back pay, doubled (essentially twenty years of salary), plus interest, compensate her for any special damages (including attorneys' fees and litigation costs) and reinstate her with seniority after a ten-year absence. *See* 31 U.S.C. § 3730(h). This potential million-dollar-plus liability would consume scarce public funds needed for law enforcement, homeland security, education and social welfare programs, and the like. Congress could not have intended for the period of liability for retaliatory discharge to so erode the public fisc or so threaten public safety.

B. A Proper Reading of § 3731 Shows That It Applies Only to the False Claims Provisions of § 3730.

Not only is the Fourth Circuit's reading of § 3731 at odds with the public interest in shorter limitations periods for wrongful discharge claims involving reinstatement and double back pay, it is at odds with the clear intent of Congress in amending the False Claims Act. Section 3729 of the False Claims Act describes the conduct constituting false claims in violation of the Act. Subsections 3730(a) through (g) set the procedure for either *qui tam* or federal government false claims actions. In 1986, Congress amended § 3730 to add § 3730(h), which creates a separate cause of action for an employee discriminated against for participating in false claims proceedings allowed in § 3730.

Section 3730(h) actions are not subject to the *qui tam* and government procedures – they are brought on behalf of the injured employee, not the United States, and are legally distinct from *qui tam* claims. Section 3731, on the other hand, sets the procedure for the *false claims* cause of action authorized in § 3730:

> Section 3731. ***False Claims*** Procedure.
>
> (a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
>
> (b) A civil action under section 3730 may not be brought – (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States

charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

31 U.S.C. § 3731 (emphasis added).

Ignoring the fact that § 3731's title states that it establishes the procedures for "false claims" actions and makes no mention of procedures for retaliation actions, the Fourth Circuit isolated § 3731(b)(1) from the remainder of the section. The Fourth Circuit concluded that because that subsection refers to § 3730 without specific limitation, Congress must have intended that the six-year limitation period in § 3731(b)(1) apply to retaliation actions authorized in § 3730(h). In so doing, the Fourth Circuit ignored the fact that subsection 3731(c) also refers to § 3730 without specific limitation in requiring that *"[i]n any action brought under section 3730,* the United States shall

be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence." 31 U.S.C. § 3731(c) (emphasis added). Under the Fourth Circuit's reasoning, therefore, the Government would have the burden to prove the elements of a retaliation claim under § 3730(h) because it is an "action brought under section 3730." This obviously was not Congress' intent, because § 3731, taken as a whole, was intended to apply only to *"false claims"* actions brought pursuant to § 3730 and not to retaliation claims.

C. The Fourth Circuit's Suggestion of an Equitable "Escape Hatch" Undercuts the Purported Goals of Repose and Administrative Simplicity.

Another flaw in the Fourth Circuit's decision is its blending of the law relating to statutes of limitation and repose and equitable tolling and estoppel into an unrecognizable mush. Causes of action for wrongful discharge or retaliation accrue at the time of the discharge or retaliatory act. *See United States ex. rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 367 F.3d 245, 260 (4th Cir. 2004) (Wilkinson, J., dissenting) (observing that the majority's interpretation of § 3731(b)(1) "is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory acts."). By pegging the start of the limitations period to the false claim rather than the retaliation, the Fourth Circuit's majority opinion "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." *Id.* at 257 (Wilkinson, J., dissenting). The Fourth Circuit dismissed these concerns, comparing § 3731(b)(1) to a statute of repose

that has the "'potential to block litigation before the tort occurs.'" *Id.* at 252 (*quoting Neal v. Honeywell, Inc.*, 33 F.3d 860, 865 (7th Cir. 1994)). The Fourth Circuit also concluded that Congress had merely "'opted for simplicity of administration.'" *Id.* at 253 (*quoting Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 (E.D. Va. 2002)); *see also Neal*, 33 F.3d at 865.

Even while conjecturing that retaliation will only infrequently occur more than six years after the filing of a false claim, the Fourth Circuit still felt constrained to address those "few instances" in a manner that undercuts its repose-and-simplicity rationale. The Fourth Circuit explained that in those situations, any limitations period can simply be jettisoned by applying equitable tolling or estoppel. *Id.* at 253-54. *See also Neal*, 33 F.3d at 866 (reasoning that "equitable tolling or estoppel would apply to § 3731(b)(1) if the firm patiently waited until six years from the false claim and then sacked the troublesome employee."). Thus, the Fourth Circuit has "undermine[d] the entire basis for a statute of limitations by counseling judges to exercise equitable tolling powers to recognize claims whenever the drawbacks of its interpretation of the FCA become too apparent to ignore." *Id.* at 257 (Wilkinson, J., dissenting). The result is that both Circuits – the Fourth and the Seventh – holding that Congress intended to enact a whistleblower limitations period of unprecedented length did so only by relying on an "escape hatch" to apply in those foreseeable situations where the limitations period undercuts Congress' goals of encouraging disclosure of false claims and protecting those who do so.

The problems with both the "statute of repose" analogy and, conversely, the equitable "escape hatch" are manifold. Notably, a statute of repose "cuts off a cause of

action at a certain time irrespective of the time of accrual of the cause of action." *Weddel v. Sec'y of Health and Human Svcs.*, 100 F.3d 929, 931 (Fed. Cir. 1996). Even more, it "operates as a statutory bar independent of the actions (or inaction) of the litigants – often before those litigants can even be identified," and as a result "prevents the cause of action from accruing in the first place." *Nesladek v. Ford Motor Co.*, 46 F.3d 734, 737 & n.3 (8th Cir. 1995). There is no indication that Congress meant to enact a statute of repose as opposed to a statute of limitations. In fact, such an interpretation would be inconsistent with Congress' goal to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." S. Rep. No. 99-345, at 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4266, 5299. Those who lose their right to sue for retaliation before they are ever retaliated against can hardly be said to have such assurance. Yet, in *Neal*, on which the Fourth Circuit relied, the Seventh Circuit indicated that § 3731(b)(1) "is another exhibit in this list" of statutes of repose. *Neal*, 33 F.3d at 860.

One district court, reviewing the "statute of repose" analysis in *Neal*, concluded that the Seventh Circuit "considered that the provisions of 31 U.S.C. § 3731(b) technically constitute a statute of limitations and not a statute of repose." *Storey*, 207 F. Supp. 2d at 445 n.21. Nevertheless, as applied by the Fourth and Seventh Circuits, § 3731(b), "[m]uch in the manner of a statute of repose . . . presents the inherent possibility that a plaintiff may be barred from court before he or she ever suffers an injury that otherwise would have been redressible." *Id.* at 445.

Apparently concerned about the absurd results presaged by their "statute of repose" analogy, both the Fourth and Seventh Circuits abandoned the analogy to pursue instead "equitable escape hatches." But it is not possible to have it both ways. The suggestion that § 3731(b)(1) is a statute of repose in disguise but at the same time subject to equitable tolling or estoppel is inherently contradictory. Although such equitable doctrines apply to statutes of limitations, "a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason. . . . " *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989). *See also Bradley v. Val-Mejias*, 379 F.3d 892, 897 n.1 (10th Cir. 2004) ("The difference between a statute of repose and a statute of limitations is that the former serves as an absolute time bar to suit whereas the latter can be tolled."); *Muñoz v. Ashcroft*, 339 F.3d 950, 957 (9th Cir. 2003) ("Statutes of repose are not subject to equitable tolling.").

Moreover, trying to rescue an absurd statutory interpretation through the threat of equitable exceptions undermines the values of repose and simplicity that the Fourth and Seventh Circuits purport to champion. "Equitable exceptions to [a] statutory limitations period should be sparingly applied. . . . The certainty and repose these provisions confer will be lost if their application is up for grabs in every case." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987).

The uncertainty is heightened here because it is not clear that either equitable doctrine would apply *before* a cause of action for retaliation has accrued. "Equitable tolling applies where the defendant has wrongfully deceived

or misled the plaintiff in order to conceal the existence of a cause of action." *Id.* at 1049. A plaintiff relying on equitable tolling must show that the defendant "attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge." *Id.* Equitable estoppel applies where, "despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." *Id.* To invoke equitable estoppel, the plaintiff must show that his "failure to file in timely fashion is the consequence either of a deliberate design by the [defendant] or of actions that the [defendant] should unmistakably have understood would cause the [plaintiff] to delay filing his charge." *Id.* (*quoting Price v. Litton Bus. Sys., Inc.*, 694 F.2d 963, 965 (4th Cir. 1982)). But, where there has been no retaliation, there is no cause of action on which a plaintiff can file, timely or otherwise.

Price is instructive. There, the plaintiff sought relief through equitable estoppel from the 180-day limitations period on his age discrimination claim. Price was removed from his position as branch manager in February 1980, but for the next several months, his employer gave written assurances that it wanted Price to stay with the company and was seeking other opportunities for him. 694 F.2d at 964-95. Although no longer serving as branch manager, Price did not leave the company until May 1980. He filed his claim 178 days later, but well over 200 days after he was removed from his position. *Id.* at 965. Price argued that his employer was equitably estopped from asserting that the limitations period ran from February rather than May. The Fourth Circuit disagreed, holding that "the attempt to mitigate the harshness of a decision terminating an employee" does not give rise to equitable estoppel, even

where it stoked the employee's "hope for . . . a continuing employment relationship." *Id.*

If equitable estoppel does not apply *after* an adverse employment decision, even where, as in *Price*, the employer takes steps to lull the employee into believing he will remain with the company, it cannot apply to actions taken (or, more accurately, not taken) by an employer *before* any adverse employment decision has even been made. Moreover, equitable remedies are based on the "wrongdoing of the defendant." *English*, 828 F.2d at 1050. It is more than passing strange to suggest that an employer has engaged in "wrongdoing" by *not* retaliating against an employee. To equate a *failure* to commit wrongdoing with a subsequent wrongful act would expand equitable tolling or equitable estoppel beyond reason.

"Reliance on equitable tolling in these circumstances undermines the value of having a statute of limitations in the first place and vests courts with unpredictable discretion with regard to late claims." *Wilson*, 367 F.3d at 260-61 (Wilkinson, J., dissenting). *See also Cada v. Baxter Healthcare Corp.*, 920 F.2d 445, 452-53 (7th Cir. 1990) ("Statutes of limitations are not arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. . . . The statute of limitations is short in . . . most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous application of tolling doctrines."). Even more daunting to cash-strapped local governments than a six-year statute of limitations is the prospect of perpetual liability under the False Claims Act whenever an employee is demoted or discharged. Disgruntled civil servants linking

adverse employment decisions to alleged false claims of a decade's vintage or more, then crying estoppel to avoid a limitations period that is already too long, could bankrupt local governments.

The Fourth Circuit's efforts to bolster its misreading of the statutory language and legislative history by relying on contradictory policy arguments that, ultimately, inject even more uncertainty into an already unsettled situation, must be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT; CHEROKEE COUNTY SOIL & WATER CONSERVATION DISTRICT; GERALD PHILLIPS; ALLEN DEHART; LLOYD MILLSAPS; BILL TIPTON; C.B. NEWTON; EDDIE WOOD; GRAHAM COUNTY,

Petitioners,

v.

UNITED STATES OF AMERICA EX REL KAREN T. WILSON

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION, AEROSPACE INDUSTRIES ASSOCIATION, AND PROFESSIONAL SERVICES COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae **National Defense Industrial Association, Aerospace Industries Association, and Professional Services Council** have a substantial interest in the subject of this appeal — the statute of limitations governing retaliatory discharge claims filed by government contractor employees (or other individuals) who bring *qui tam* actions under the federal False Claims Act ("FCA"), 31 U.S.C § 3729 *et seq.* The government contractor members of these associations are the types of companies likely to be subjected to claims alleging such "whistleblower" retaliation. The associations are submitting this *amicus curiae* brief in order to shed additional light on the reasons why the lower court's attempt to engraft the six-year limitations period for "false claims" causes of action onto retaliatory discharge claims is wholly unfair and impractical, as well as plainly inconsistent with the language, structure, and purpose of the FCA.

The **National Defense Industrial Association** (NDIA) is a non-partisan, non-profit organization with a membership encompassing over 1,100 companies and close to 40,000 individuals. NDIA's members, which include some of the nation's largest defense contractors as well as many small businesses, provide a wide variety of goods and services to the Federal Government. The association has a specific interest in policies and practices concerning the government's acquisition of goods and services, including

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

research and development, procurement, and logistics support.

The **Aerospace Industries Association** (AIA) represents the nation's leading manufacturers and suppliers of civil, military, and business aircraft, helicopters, unmanned aerial vehicles, space systems, aircraft engines, missiles, materiel, and related components, equipment, services, and information technology.

The **Professional Services Council** (PSC) is the leading national trade association that represents companies of all sizes providing professional and technical services to the virtually every agency of the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, environmental and social sciences.

As the government contracting industry's leading voices on federal procurement matters, these associations sponsor numerous seminars emphasizing compliance with federal procurement laws and regulations, including the FCA, to enhance their member companies' ability to comply with their responsibilities as government contractors. NDIA and AIA have submitted *amicus* briefs to the Supreme Court in matters involving government contracting, including two FCA cases heard by the Court in recent years.[2]

Amici believe that the opinion below, which provides plaintiffs with an excessively long period of time in which to

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2 AIA and NDIA's predecessor submitted briefs in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 519 U.S. 926 (1996) (successful challenge to the retroactive application of the 1986 FCA amendments), and AIA submitted a brief in *United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 529 U.S. 765 (2000) (unsuccessful constitutional challenge to *qui tam* relator's standing).

file retaliation claims, does not enhance FCA enforcement. Nor does the ruling provide clarity to litigants or other interested parties as to when the period of limitations commences.

Rather, the lower court's ruling permits some employees to delay seeking redress of their alleged retaliation claims until the matter has grown stale and the collective memory of other personnel involved in the matter has faded. Further, holding that the limitations period commences when the alleged false claim is submitted instead of when the alleged retaliation occurred would produce impractical and counter-productive results, including in some instances barring the retaliation claim before the alleged retaliation has occurred, and in other instances rendering it impossible for either party to identify when the period commenced.

SUMMARY OF ARGUMENT

The Fourth Circuit determined that an employee who claims that she has been retaliated against by her employer for reporting violations of the FCA has six years from the employer's submission of the false claim to file her retaliatory discharge action under § 3730(h). *Amici* agree with petitioners that the FCA's six-year statute of limitations applies only to the cause of action alleging that a false claim was submitted by a contractor, and *not* to the employee's cause of action for retaliatory discharge.

Because, in *amici*'s view, the FCA does not provide a limitations period for retaliatory discharge claims, such actions are governed by the most closely analogous state law limitations period, typically for wrongful discharge in violation of public policy. Contrary to the lower court's finding that there is inherent uncertainty in identifying the appropriate state statute of limitations (Pet. App. 25a-26a), the table included in this *amicus* brief (*infra* at 17-18) shows the appropriate statute of limitations for each of the 45 states that recognize a cause of action for wrongful discharge in violation of public policy. The table reflects that most states,

including states such as California and Virginia where there is a heavy concentration of government contractors, provide a limitations period of two years or less, thereby lending credence to the dissent's succinct observation that "six-years is a long time." Pet. App. 29a.

Amici maintain that the Fourth Circuit's majority decision runs afoul of the language, structure and purpose of the FCA. The associations also take issue with the lower court majority's unsupported generalizations about the nature of FCA litigation, including the court's conclusion that commencing the period of limitations from the date of the false claim is justified because it supposedly is easier to pinpoint than the date of the alleged retaliatory conduct. To the contrary, *qui tam* complaints frequently are vague as to when the alleged false claim was submitted, making it difficult, if not impossible, to determine when the limitations period for a retaliation claim would commence. On the other hand, the date of the alleged act of retaliation is more easily identifiable because the employee certainly would know when he or she was terminated or suffered other alleged harm, and the employer could refer to personnel records which would reflect when any disciplinary action occurred.

There is no statutory or policy justification for commencing the limitations period for retaliation claims from any date other than the date of the retaliatory act. As described in the specific examples below (*infra* at 10-12), the Fourth Circuit's construction would produce impractical and unmanageable results and needless further litigation.

ARGUMENT

I. THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS PLAINLY APPLIES ONLY TO "FALSE CLAIMS" CAUSES OF ACTION

Contrary to the Fourth Circuit's decision, the "plain language" of the FCA's statute of limitations, § 3731(b), does not afford a six-year limitations period in which to

bring a retaliation action under § 3730(h). Rather, § 3731(b), when read in full and in context, applies exclusively to "false claims" causes of action.

The court of appeals attempted to justify its finding by relying solely upon § 3731(b)'s introductory reference to an action "under section 3730," and concluded that those words – by themselves – mean that the statute of limitations covers an action under *any* part of § 3730, including subpart (h), the retaliatory conduct provision.[3] Pet. App. 5a ("an action under section 3730 which necessarily includes an action for retaliation under section 3730(h)"). Once the court concluded that the introductory reference was inclusive of all actions under § 3730, including subpart (h), it then attempted to force-fit the additional verbiage of the provision – which clearly has nothing to do with the employer's retaliatory conduct – into a statute of limitations governing the filing of retaliatory conduct claims.

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3 The FCA's statute of limitations (§ 3731(b)) states in full: "A civil action under section 3730 may not be brought --

(1) more than 6 years after the date on which the violation of 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last."

The retaliatory conduct cause of action, § 3730(h), provides: "Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole."

The FCA's statute of limitations, read as a whole, does not give any indication that it applies to retaliatory discharge claims under § 3730(h). Rather, the provision falls under the heading "False claims procedure," a title which itself suggests that the provision is limited to the "false claims" causes of action arising under § 3729, which are brought either by the government under § 3730(a) or a private person (a so-called *qui tam* relator) under § 3730(b).

After § 3731(b)'s introductory reference to "[a] civil action under section 3730," every other reference point in the statute of limitations is to accrual of the cause of action for submitting a false claim. Section 3731(b)(1) refers specifically to the date of the violation of § 3729, and § 3731(b)(2) refers to the date when the government first learned of the violation of § 3729.[4] *See supra,* n.3.

The Fourth Circuit failed to heed a primary rule of statutory construction which it cited, namely that in determining whether the language is plain, courts must look to "'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" Pet. App. 4a (*citing Robinson v. Shell Oil Co.*, 519

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4 Section 3731(b)(2) tolls the running of the statute for up to three years when the "facts material to the right of action" were known "by the official of the United States charged with responsibility to act in the circumstances . . . ." No government official is responsible for or involved in bringing an action to enforce an employee's claim under § 3730(h). Clearly the "right of action" that is referenced is the false claims cause of action. Accordingly, the tolling provision, which can extend the statute of limitations to ten years, pertains only to a cause of action under § 3729 for submission of a false claim for payment to the government. The Fourth Circuit does not suggest that this tolling provision has any applicability to a retaliation claim. If the Court reads the provision's subsections consistently, just as the "right of action" mentioned in § 3731(b)(2) has no bearing on a retaliation claim, neither does the "violation" mentioned in § 3731(b)(1).

U.S. 337 (1997)). In contrast, the Ninth Circuit, in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998), and Judge Wilkinson in his dissent in the instant case (Pet. App. at 30a-32a), correctly applied this rule of statutory construction and found that the provision plainly applies only to the underlying false claim cause of action, not to retaliatory conduct claims. No reference to legislative history or extraneous analysis is necessary.

Beyond erroneously interpreting the plain meaning of the statute, the Fourth Circuit also misconstrued the FCA's legislative history. When Congress added § 3730(h) in 1986, it amended the FCA's statute of limitations to refer specifically to false claims allegations under § 3729. False Claims Amendment Act of 1986, Pub.L. 99-562, 100 Stat. 3153. *Lujan* correctly reasoned that Congress intended this change to narrow the FCA's statute of limitations to violations of § 3729.

> If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 language of section 3731(b) intact when it enacted the 1986 amendments to the FCA. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.

162 F.3d at 1034-35. *Lujan* further observed that Congress' stated rationale for the lengthy period of limitations – to ensure the government's rights are not lost through the violator's deception – "is inapposite to a private claim for retaliation," observing, "[t]here is nothing covert or deceptive about retaliation – the victim feels its sting immediately." *Lujan*, 162 F.3d at 1035 (*citing* S.Rep. No. 99-

345, 99th Cong., 2d Sess. 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280).

The Fourth Circuit's reference to legislative history is unavailing, and the Ninth Circuit's view that Congress actually narrowed the statute of limitations to exclude all but false claims causes of action is the more sound conclusion.

II. IT WOULD BE UNFAIR AND IMPRACTICAL TO APPLY THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS TO RETALIATORY DISCHARGE CLAIMS

The Fourth Circuit's erroneous application of the FCA's statute of limitations to retaliation claims creates a situation unlike any other wrongful discharge statute of limitations. As noted in the dissent, the court "introduces an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." Pet. App. 28a-29a. The majority's reasoning and its generalizations about the nature of FCA litigation are unrealistic and would lead to absurd outcomes, some of which are illustrated herein.

Instead of linking the limitations period for the retaliation claim to the alleged act of retaliation, the decision is premised on an *erroneous* finding that the act of retaliation is somehow linked to the act of submitting the false claim. "[Section] 3730(h) subsumes a violation of section 3729, even if it does not do so explicitly. . . . Because an action under section 3730 will not lie absent an alleged violation of section 3729, it is clear that Congress has elected to identify a single, readily identifiable point at which to begin the limitations periods for all actions under section 3730." Pet. App. 14a.

This notion that a retaliation claim will not lie absent an underlying allegation that the employer submitted a false claim, is unfounded. Courts have held that § 3730(h) is

broadly worded to protect employees who investigate possible false claims, even if their investigation comes up empty or they decide not to bring a false claims cause of action. Thus, liability under § 3730(h) can exist even where there has been no alleged violation of § 3729 (*i.e.*, no false claim allegation by the employee). *See, e.g., United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 236 (1st Cir. 2004) ("retaliation claim does not require the plaintiff to have filed an FCA lawsuit or to have developed a winning claim at the time of the alleged retaliation"); *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 188 (3rd Cir. 2001) ("employees need not actually file a False Claims Act suit to assert a cause of action under section 3730"); *Childree v. UAP/GA AG Chem., Inc.*, 92 F.3d 1140, 1143 (11th Cir. 1996) (plaintiff "never considered" bringing false claims cause of action but was nevertheless permitted to maintain her retaliation claim); *Neal v. Honeywell Inc.*, 33 F.3d 860, 861 (7th Cir. 1994) (plaintiff claimed retaliation by employer after she supplied information about false claims to in-house counsel, but she did not file § 3729 claim against her employer); *Clemes v. Del Norte County Unified School District*, 843 F. Supp. 583, 585 (N.D. Cal. 1994) (plaintiff filed discrimination claims under several statutes including § 3730(h), but did not file a false claims action). Indeed, one court has held that a plaintiff may maintain a § 3730(h) retaliation claim even if a § 3729 complaint has been rejected as meritless by a jury. *See United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731 (D.C. Cir. 1998).

As in the foregoing cases, if there is no underlying allegation that a false claim was submitted, then under the Fourth Circuit's construction, the period of limitations for the retaliation claim would *never* commence. That is an absurd result. It is well-settled that this Court will not construe a statute in a manner that leads to absurd or futile results. *See United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940); *In re Chapman*, 166 U.S. 661, 667 (1897) ("nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the

legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion").

Even when a retaliation claim is accompanied by an underlying false claims allegation, because the former, by its very nature, would occur subsequent to the latter, the two acts do not, and cannot, occur simultaneously. Indeed, they typically are far removed in time from each other. This is demonstrated in the following common scenarios, which show the impracticality of setting the accrual date for the retaliation claim as the same date that the false claim is submitted.

Example 1. In 2000, during the early stages of performing a long-term government contract, the employer submits a false claim. The employee does not discover the false claim until 2005 when the contract performance is completed and the employee examines all of the cost submissions. Immediately upon discovery in 2005, the employee reports the matter to the employer and to the government. If the employer postpones retaliation against the employee until 2007, under the Fourth Circuit's illogical construction, the employee's retaliation claim would be time barred.

Example 2. In the same scenario as Example 1, the employee files a *qui tam* action in 2005 upon discovering the false claims, but the matter remains under seal for two years, during which time the employer is unaware of the suit. In 2007, when the seal is lifted and the employer learns of the whistleblowing, the employer immediately retaliates against the employee. Regardless of whether the employee files a separate action under § 3730(h) or amends his *qui tam* complaint to add the new retaliation claim, the claim would be time barred.

This example is not far-fetched given the procedural aspects of initiating a *qui tam* action. Under § 3730(b)(2), *qui tam* complaints are filed under seal for at least 60 days while the government investigates the matter and decides

whether or not to intervene. The primary intent of this provision is to permit the government to investigate the matter without tipping off the defendant. *Lujan*, 67 F.3d at 243. It is not unusual for *qui tam* complaints to remain under seal for years while the government conducts its investigation.[5] Thus, the time period between the submission of the false claim and the notification to the employer about the employee's whistleblowing (which is one of the predicates for a retaliation claim)[6] can be lengthy. Under the Fourth Circuit's illogical construction, the retaliation claim would be time barred in such situations.

Example 3. Employee A works in the accounts receivable department and witnesses the submission of the false claim on the day it was submitted in 2000. He complains about the conduct and suffers retaliation on that day. Employee B works in the internal audit department discovers the same false claim during her contract close-out audit in 2005. Employee B complains immediately to the employer who immediately retaliates against her. Though both employees suffered retaliation immediately after they

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5 *See e.g., United States ex rel. Clausen v. Laboratory Corp. of America*, 290 F.3d 1301, 1303-04 (11th Cir. 2002) (complaint under seal for almost four years); *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827, 829 (9th Cir. 1993) (complaint under seal for over two years); *United States ex rel. Yannacopolous v. General Dynamics*, 315 F. Supp.2d 939, 944 n.7 (N.D. Ill. 2004) (complaint under seal for seven years); *United States ex rel. Ortega v. Columbia Healthcare*, 240 F. Supp. 2d 8, 11 (D.D.C. 2003) (complaint remained under seal for three years); *United States v. St. Joseph's Reg'l Health Ctr.*, 240 F. Supp. 2d 882, 883-84 (W.D. Ark. 2002) (complaint remained under seal as to some defendants for over five years).

6 *See Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3rd Cir. 2001) (retaliation under § 3730(h) requires proof that employer had knowledge of plaintiff's whistleblowing at the time of the retaliatory conduct).

complained about the same false claim, employee A has six years to file his retaliation claim and employee B has one year.

Example 4. Employee A witnesses the submission of a false claim in 2000. In the same week, employee A complains to the employer, suffers retaliation and files a *qui tam* action and a retaliation claim. The complaint is unsealed in 2004 after a lengthy government investigation. Three years later in 2007, the case proceeds to trial. Employee B is called as a witness and testifies against the employer. Later that day, the employer fires employee B. Employee B's claim under § 3730(h) already would be time barred under the Fourth Circuit's illogical construction.

These scenarios illustrate that if the accrual date of a retaliation claim is held to be the date the false claim is submitted rather than the date the retaliation occurs, then individual employees would have widely varying periods of limitation governing their retaliation claim depending on how close in time the retaliation was to the submission of the false claim.

This impractical result was observed in one of the earliest decisions involving the FCA's retaliatory discharge provision.

> [I]f the accrual date is not a function of the date of retaliation, individual employees will have widely varying periods of limitations. It is both unreasonable and unfair for identically situated plaintiffs to be held to widely varying periods of limitation because the accrual date for the limitations period is unrelated to their claim. . . . . [The purpose behind § 3730(h)] is best satisfied by allowing an equal period for all employees to bring a private action and to have that period to begin to run from the time of the retaliation.

United States ex rel. Truong v. Northrop Corp., No. CV 88-967 MRP, 1991 WL 496831, at *2 (C.D. Cal. Nov. 26, 1991). Application of state statutes of limitations would allow an equal period for all employees affected by the same alleged act of retaliation who bring suit in the state where the conduct occurred, which is normally where such actions are filed.

The above scenarios demonstrate the fundamental flaw in the Fourth Circuit's assumption that there is a close temporal relationship between the submission of the false claim and the retaliatory discharge act.

III. ENGRAFTING THE FALSE CLAIMS ACT'S STATUTE OF LIMITATIONS ONTO RETALIATORY DISCHARGE CLAIMS WOULD ENGENDER CONFUSION RATHER THAN FOSTER SIMPLICITY

The Fourth Circuit errs in concluding that its construction fosters "simplicity of administration" on the theory that (a) it is easier to pinpoint the date on which the false claim occurred than the date on which the retaliation occurred, and (b) it is preferable to utilize a single federal statute of limitations rather than subject retaliation claims to "vagaries of a patch-work of state limitations periods, some as short as six months." Pet. App. 13a-25a. The dissent correctly notes that there is no indication in the legislative history of Congress' desire to simplify the statute of limitations by having the false claim cause of action and retaliation claims accrue from the same starting point. Pet. App. 37a-41a.

A. It Typically Is Easier For Both Employee And Employer To Ascertain The Date Of The Alleged Retaliatory Act Than The Date Of The Alleged False Claim

The court asserts "it is easier to determine the date of a false claim than to pin down the time of retaliatory acts; the

claim is a document, but arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication." Pet. App. 14a (*citing Neal v. Honeywell, Inc.*, 33 F.3d at 865).

This notion is far removed from the reality faced by FCA defendants in the many cases in which the date of the alleged false claim is anything but clear. *Qui tam* complaints typically are subjected to challenge under Rule 9(b) of the Federal Rules of Civil Procedure for lack of particularity as to when the false claim was submitted. While some complaints are dismissed on this basis, others survive without clearly setting forth the date of the false claim, making it difficult to ascertain the commencement of the limitations period. *See, e.g., United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251 (D.C. Cir. 2004)* (upholding dismissal of relator's FCA claim for its failure to specify dates within an open-ended period spanning several years while, at the same time, reinstating the associated retaliation claim); *Bantsolas ex rel. United States v. Superior Air and Ground Ambulance Transp, Inc.*, No. 01 C 6168, 2004 U.S. Dist. LEXIS 4540, at *6, 10 (N.D. Ill. March 18, 2004) (relator directed to amend complaint where false claims allegations encompassed 21 month period but failed to identify dates of false claims within the period); *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 238 F. Supp. 2d 258, 268 (D.D.C. 2002) (relator adequately pled scheme spanning twelve years despite failure to identify specific dates of alleged false claims); *Karvelas*, 360 F.3d at 223, 232-35 (dismissal of FCA allegations upheld where relator failed to specify dates of false claims allegedly committed from 1994 to 1997). In these and other similar factual situations, it is difficult to assert a statute of limitations defense without undertaking prolonged discovery efforts. In that regard, the judicial economy that normally results from applying statutes of limitations is severely diminished.

Under the Fourth Circuit's construction, it is conceivable that a plaintiff could argue that an act of

retaliation which occurred seven years earlier is not time barred because the wrongdoing that allegedly resulted in the submission of false claims continues up to the present time. Thus, the mere allegation of continuing conduct would breathe life into a stale retaliation claim that the employer never expected to see.

In contrast to the uncertainty which typically surrounds the time that the alleged false claim was submitted, the date of an alleged retaliatory act by the employer is more easily ascertainable. Whereas the employee may be unaware of the when the false claim was submitted to the government, he certainly would know the precise date on which some supposed act of retaliation directed against him occurred. Similarly, while the timing of some retaliatory acts, such as threats or harassment, might be difficult for the employer to ascertain, there almost certainly would be a record of acts such as termination of employment, demotion, suspension or other official disciplinary action. These dates could be discovered by examining the employee's personnel file; thus, both an employee and employer would be in a position to know when the period of limitations commenced.

B. Applying State Statutes Of Limitation To Federal Causes Of Action Is Neither Unusual Nor Unduly Complicated

It is not unusual for federal statutes to omit an all-encompassing statute of limitations. *See Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 147 (1987) ("Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law."). In such instances, the rule of statutory construction calls for applying the most closely analogous statute of limitations under state law. *See Reed v. United Transport Union*, 488 U.S. 319, 322 (1989) (applying North Carolina's three year statute of limitations for personal injury claims to a claim involving violation of the right to free

speech under the Labor – Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 411(a)(2)), a law which contained no express statute of limitations for such claims).

This Court has acknowledged that sometimes the practice of relying on state statutes of limitations can result in confusion and inconsistency where it is difficult to determine the most analogous state law from a variety of similarly worded statutes containing different limitations periods. *See Owen v. Okure*, 488 U.S. 235, 240 (1989). That is not the case here. While the decision below imagines difficulties in determining the appropriate state law limitations period, most states have a statute of limitations for personal injury claims which normally would apply to the tort of wrongful discharge in violation of public policy. For example, *Lujan* held that this tort was most analogous to the § 3730(h) claim, and therefore, it applied California's one-year statute of limitations (in effect at the time) for wrongful termination in violation of public policy (Cal.Civ.Proc.Code § 340(3) (West Supp. 1998)). *Lujan*, 162 F.3d at 1035.

Each of the following state statutes of limitations have been held to be applicable to claims for wrongful discharge in violation of public policy, likely the "most closely analogous" state statute to apply in a § 3730(h) action brought in the federal court in that state.[7]

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[7] As the decision below notes, some states have limitations periods for particular actions, such as the Texas law imposing a 180-day period in which a health care worker has to file an action alleging retaliation for reporting illegal or unethical conduct in the operation of a health care facility. Pet. App. 24a-25a (*citing* Tex. Health & Safety Code Ann. § 161.132, 161.134). Where the § 3730(h) allegations appear to be analogous with a particular state statute, the court would have to decide between that statute and the general provision governing the filing of wrongful discharge actions. In most instances, as in *Lujan* and in the case

(Footnote cont'd on next page)

State	***Limitations Period***	***State Statute***
AL	2 years	Ala. Code § 6-2-38
AZ	1 year	Ariz. Rev. Stat. Ann. § 12-541
AR	5 years	Ark. Code Ann. § 16-56-115
CA	2 years	Cal. Civ. Proc. Code § 335.1
CO	2 years	Colo. Rev. Stat. Ann. § 13-80-102
CT	3 years	Conn. Gen. Stat. Ann. § 52-577
DE	2 years	Del. Code Ann. tit. 10, § 8119
DC	3 years	D.C. Code Ann. § 12-301
HI	2 years	Haw. Rev. Stat. Ann. §§ 657-1, 657-4, 662-4
ID	4 years	Idaho Code §§ 5-217, 5-219, 5-224
IL	2 years	735 Ill. Comp. Stat. Ann. 5/13-202
IN	2 years	Ind. Code Ann. § 34-11-2-4
IA	2 years	Iowa Code Ann. § 614.1
KY	5 years	Ky. Rev. Stat. Ann. § 413.120
LA	1 year	La. Civ. Code Ann. art. 3492
MD	3 years	Md. Code Ann., Cts. & Jud. Proc. § 5-101
MA	3 years	Mass. Gen. Laws Ann. ch. 260, § 2A
MN	2 years	Minn. Stat. Ann. § 541.07
MS	3 years	Miss. Code Ann. § 15-1-49
MO	5 years	Mo. Ann. Stat. § 516.120
MT	1 year	Mont. Code Ann. §§ 39-2-901 *et seq.*
NE	4 years	Neb. Rev. Stat. Ann. § 25-212
NV	3 years	Nev. Rev. Stat. Ann. § 11.190
NH	3 years	N.H. Rev. Stat. Ann. § 508:4
NJ	6 years	N.J. Stat. Ann. § 2A:14-1
NM	4 years	N.M. Stat. Ann. § 37-1-4
NY	1 year	N.Y. C.P.L.R. 215

(Footnote cont'd from previous page.)

below, the general wrongful discharge statute of limitations would apply.

State	*Limitations Period*	*State Statute*
NC	3 years	N.C. Gen. Stat. § 1-52
ND	6 years	N.D. Cent. Code § 28-01-16
OH	4 years	Ohio Rev. Code Ann. § 2305.09
OK	2 years	Okla. Stat. Ann. tit. 12, § 95
OR	2 years	Or. Rev. Stat. § 12.110
PA	2 years	Pa. Stat. Ann. tit. 42 § 5524
RI	N/A	R.I. Gen. Laws § 9-1-14
SC	3 years	S.C. Code Ann. § 15-3-530
SD	3 years	S.D. Codified Laws § 15-2-14
TN	1 year	Tenn. Code Ann. § 28-3-104
TX	2 years	Tex. Civ. Prac. & Rem. Code Ann. § 16.003
UT	1 year	Utah Code Ann. § 78-12-29
VT	3 years	Vt. Stat. Ann. tit. 12, §§ 511, 512
VA	2 years	Va. Code Ann. § 8.01-243
WA	3 years	Wash. Rev. Code Ann. § 4.16.080
WV	2 years	W. Va. Code § 55-2-12
WI	2 years	Wis. Stat. Ann. § 893.57
WY	4 years	Wyo. Stat. Ann. § 1-3-105

Another reason offered by the Fourth Circuit for avoiding state statutes of limitations is that generally the state statutes provide shorter limitations periods. That observation is correct. Nearly half the states listed above provide a limitations period of two years or less, and nearly three quarters provide a period of three years or less. (These states include California, Texas, Virginia, Pennsylvania, New York, Colorado, and Maryland, states with heavy concentrations of government contractor employees.) These shorter periods, however, do not support the court's efforts to manufacture a relationship between the cause of action for retaliation and the unrelated FCA's longer limitations period.

The court employs circular reasoning in its assertion that applying state law would "undermine the very protection that Congress intended to confer by enacting § 3730(h)." Pet. App. 25a. As noted in the dissent, there simply is no

statutory language or legislative history suggesting that Congress intended to simplify the administration of such claims by having a federal limitations period. Pet. App. 37a-39a. The dissent further notes that application of the FCA's six-year period is not justified simply because it provides a longer duration than most state statutes provide. *Id.* "It is altogether plausible that Congress chose to respect . . . the diverse views of states on the length of limitations periods for wrongful discharge . . . ." *Id.*

Congress clearly intended to encourage whistleblowers to bring *qui tam* actions (as reflected in the FCA's bounty provision (§ 3730(d)), and to protect plaintiffs against retaliation by providing in § 3730(h) the remedy of double back pay, special damages and attorneys' fees. While Congress perceived the need for a uniform federal *remedy* against whistleblower retaliation, there is no such need for uniformity with regard to the merely *procedural* aspect of how soon a complaint must be filed.

Moreover, there is substantial justification for applying shorter limitations periods to retaliation claims. The policy behind any statute of limitations is to protect defendants from stale claims. *Wilson v. Garcia*, 471 U.S. 261, 271 (1985) ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost"); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (Court noted in action against employer that statutes of limitations are designed to assure fairness to defendants by preventing surprises where evidence has been lost, memories have faded, and witnesses have disappeared).

Even in matters where the alleged retaliatory act occurred near the time of the alleged false claim, government contractors would be prejudiced if they were subject to employment-related claims brought six years later. Companies that employ tens of thousands of people can find it difficult to maintain a collective memory of the relevant events associated with one particular employee, particularly

if the retaliatory conduct was in the nature of harassment by a co-worker or some other unofficial, unauthorized conduct. Given the nature of government contracting, different projects come and go and employees frequently find themselves working within different groups of co-workers or moving to another division or company altogether. Section 3730(h) claims can be based upon alleged discrimination in employee compensation which itself is often based on subjective criteria that may be difficult for the employee's supervisors to recollect years later.

Under the Fourth Circuit's ruling, an employee can gain a significant tactical advantage over the employer by delaying filing her retaliation claim. The employee might have a greater recollection of the events because they affected her personally. In addition, the prolonged delay in filing could enhance the damages available to the employee under the double back pay provision.

Companies are entitled to know how long they remain subject to suit by a disgruntled employee. As the Supreme Court stated, "statutes of limitations . . . represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (*quoting Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)). State laws governing employment-related litigation form a basis for company record-keeping procedures and other compliance procedures. Government contractors should not have to endure the uncertainties that would arise from applying the FCA's statute of limitations to an employment claim. Nor should they be held accountable for up to six years for an action that could have been brought by the impacted employee almost immediately after that alleged wrongful conduct occurred.

CONCLUSION

For the foregoing reasons, *amici* NDIA, AIA, and PSC urge the Court to reverse the Fourth Circuit on the question presented and hold that the FCA does not specify a limitations period for retaliation claims.

Respectfully submitted,

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GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT, *et al.*,

Petitioner,

v.

UNITED STATES, ex rel. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE TAXPAYERS AGAINST FRAUD EDUCATION FUND IN SUPPORT OF RESPONDENT

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Brief of *Amici Curiae* National Employment Lawyers Association and Taxpayers Against Fraud Education Fund in Support of Respondent

The National Employment Lawyers Association ("NELA") and Taxpayers Against Fraud Education Fund ("TAFEF") files this Brief as *Amici Curiae* in support of Respondent. NELA and TAFEF request *affirmance* of the Fourth Circuit's decision applying the six-year limitations period in 31 U.S.C. § 3730(b)(1) of the False Claims Act to employment retaliation claims arising under 31 U.S.C. § 3730(h) of the False Claims Act.

INTEREST OF *AMICI CURIAE*

NELA and TAFEF file this *amici curiae* brief with the consent of all parties.[1] NELA is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amici curiae* National Employment Lawyers Association (NELA) and Taxpayers Against Fraud Education Fund (TAFEF) state that no counsel for either party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Taxpayers Against Fraud Education Fund ("TAFEF") is a nonprofit public interest organization dedicated to combating fraud against the federal government through the promotion of the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729 *et seq.* and the support of whistleblowers who use the Act. The *qui tam* provisions of the Act permit a private relator to file suit on behalf of the United States alleging violations of the Act. In addition, the Act provides retaliation protection for the *qui tam* relator who brought the case. Typically, relators will file their retaliation claim along with the underlying False Claims Act claim, so as not to violate the public disclosure and seal provisions of the Act. TAFEF therefore has a strong interest in ensuring that the six-year statute of limitations provision is correctly applied to both claims - the retaliation claim and the False Claims Act claim - thus preventing premature actions under the Act.

NELA and TAFEF are familiar with the questions involved in this case and the scope of their presentation and believe there is a necessity for additional argument on these points. NELA and TAFEF feel that it would be helpful to the Court, and important to the public, to file this *amici curiae* brief in order to assist the Court in the resolution of this case. NELA and TAFEF have a profound and abiding interest in ensuring that the employment retaliation protections in the False Claims Act are appropriately interpreted and applied.

SUMMARY

The Fourth Circuit's decision ensures that there will be a uniform limitations period for all employee whistleblower retaliation claims under the False Claims Act. A statute of limitations that varies based upon (1) factual differences in the type of retaliation that occurred, (2) the type of employment (private or public), or (3) the state in which an action is brought (where the plaintiff whistleblower worked or where the fraud occurred), will impair the strong federal interests in consistent enforcement of a federal anti-fraud scheme, lead to inconsistent results, create a patchwork quilt of time limitations and facilitate forum-shopping in cases where time limits may have otherwise run or may have been extended. Finally, a short statute of limitations, like those common under closely analogous state statutes prohibiting employment or other whistleblower discrimination, will interfere with the False Claims Act's *qui tam* provisions that require a filing under seal and frequently spawn undercover or other criminal investigations. Absent meaningful False Claims Act employment protections with an adequate and certain time period for bringing claims, many employees will fear to "blow the whistle" on fraud, will be discouraged from notifying employers of suspected wrongdoing and will not come forward to assist the federal government in exposing fraud or will be unwilling witnesses.

ARGUMENT

I. THE FOURTH CIRCUIT CORRECTLY DECIDED THAT THE RESPONDENT EMPLOYEE HAD SIX YEARS WITHIN WHICH TO BRING AN ACTION FOR "PROTECTED ACTIVITY" UNDER THE FALSE CLAIMS ACT'S RETALIATION PROVISIONS IN 31 U.S.C. § 3730(H) WHEN THE FALSE CLAIMS ACT STATUTE PROVIDES FOR A SIX-YEAR STATUTE OF LIMITATIONS FOR "ALL CLAIMS BROUGHT UNDER THIS SECTION."

In 1986, Congress enacted employee retaliation protections as part of its comprehensive overhauling of the False Claims Act, 31 U.S.C. § 3729 *et seq.* The so-called "Lincoln Law," a Civil War-era statute, now forms a vital part of the federal enforcement scheme for identifying and

prosecuting financial fraud schemes perpetrated on the United States.[2] The 1986 Amendments reinvigorated the law by, *inter alia*, increasing the ability of private persons to bring actions "for themselves and the United States as *qui tam* relators, clarifying the burden of proof, increasing penalties and amending the damages provisions, and otherwise making the Act a more effective mechanism to ferret out schemes to defraud the Government and to recover funds[3]."

An important element in the overall Congressional strategy to incentivize insiders, frequently employees of government contractors, were new provisions codified at 31 U.S.C. § 3730(h). Congress intended vigorous anti-retaliation protections for employee whistleblowers who investigated or otherwise disclosed illegal schemes that violate the False Claims Act. Congress enacted the law after whistleblowers testified about the need to bar employment retaliation in order to encourage reporting of government contracting fraud.[4]

The Section 3730(h) whistleblower protection states:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer

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[2] *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768 n. 1 (2000); *Hutchens v. Wilentz, Goldman & Spitzer*, 253 F.3d 176 (3d Cir. 2001).

[3] Sylvia, Claire M., "The False Claims Act: Fraud Against the Government" § 2:9 (Thomson-West 2004).

[4] McKnight, H. Vincent, *et al.*, "Causes of Action by Employee for Retaliation and Reprisal Pursuant to the False Claims Act, 31 U.S.C.A. § 3730(H)," 22 *Causes of Action 2d.* 217, § *2 at* 226 (West 2003).

> because of lawful acts done by the employee on behalf of his employer or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.

The statute provides reinstatement with seniority, double back pay, interest, special damages sustained as a result of discriminatory treatment, and attorneys fees and costs.[5] Federal jurisdiction exists for whistleblower claims under the False Claims Act, 31 U.S.C. §§3730(b) and 3732(a)-(b), in addition to general federal question jurisdiction. 28 U.S.C. §1331.

To prove a Section 3730(h) retaliatory discharge claim, the whistleblower must show that she or he engaged in conduct protected by the False Claims Act.[6] The courts also

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[5] 31 U.S.C. § 3730(h); *Hammond v. Northland Counseling Center, Inc.*, 218 F.3d 886, 891-894 (8th Cir. 2000); *United States ex rel. Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 538, 544-545 (8th Cir. 2000); *Neal v. Honeywell, Inc.*, 191 F.3d 827, 831-834 (7th Cir. 1999) (other history omitted); *Eberhardt v. Integrated Designs & Construction, Inc.*, 167 F.3d 861, 872 (4th Cir. 1998) (interest should be provided).

[6] *Hutchens, supra*; *United States ex rel. McKenzie v. BellSouth Telecommunications, Inc.*,123 F.3d 935, 943-944 (6th Cir. 1997) *cert. denied* 522 U.S. 1077 (1998), *after remand*, 219 F.3d 508, 513 (6th Cir. 2000); *United States ex rel. Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733 (7th Cir. 1999); *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 736 (D.C. Cir. 1998); *Zahodnick v. International Business Machines Corp.*, 135 F.3d 91 (4th Cir. 1997); *Hopper v. Anton*, 91 F.3d 1261, 1269 (9th Cir. 1996); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996); *Neal*, 33

(continued...)

require a showing that the defendant has some notice of the protected conduct that the whistleblower was either taking action in furtherance of a *qui tam* action or assisting in an investigation or actions brought by the Government.[7] Finally, the whistleblower must show that the termination was in retaliation for the protected activities.[8]

The protection against retaliation has been extended by most courts to whistleblowers whose allegations could legitimately support a False Claims Act case, even though no case is ever filed by a relator, co-worker, or the Department of Justice.[9] Courts have also held that Section 3730(h) does not require that the plaintiff even have been aware of the False Claims Act at the time he or she engaged in the relevant activity.[10]

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[6] (...continued)
F.3d at 864; *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 951 (5th Cir. 1994), *cert. denied*, 513 U.S. 1154 (1995) (citing S. Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5300).

[7] *Hutchens*, 253 F.3d at 186; *United States ex rel. McKenzie*, 123 F.3d at 943-944; *Eberhardt*, 167 F.3d at 868; *United States ex rel. Yesudian*, 153 F.3d at 744; *Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1146 (11th Cir. 1996); *Hopper*, 91 F.3d at 1269-70; *United States ex rel. Ramseyer*, 90 F.3d at 1522; *Robertson*, 32 F.3d at 951; *Neal*, 33 F.3d at 864.

[8] *Wilkins v. St. Louis Housing Authority*, 314 F. 3d 927, 932-933 (8th Cir. 2002); *Hutchens*, 253 F.3d at 186; *United States ex rel. Yesudian*, 153 F.3d at 736; *Hopper*, 91 F.3d at 1269-70; *United States ex rel. Ramseyer*, 90 F.3d at 1522.

[9] *United States ex rel. Yesudian*, 153 F.3d at 736, 739; *Childree*, 92 F.3d at 1146; *United States ex rel. Ramseyer*, 90 F.3d at 1522; *Neal*, 33 F.3d at 864-865.

[10] *United States ex rel. Yesudian*, 153 F.3d at 741.

The False Claims Act's only limitations provision is found in 31 U.S.C. § 3731(b) and applies to all civil actions brought under 31 U.S.C. § 3730. The provision states:

> (b) A civil action under section 3730 may not be brought -
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

The 31 U.S.C. § 3730 provision, referred to in 31 U.S.C. § 3731(b) above, includes three types of civil actions:

1) a cause of action brought by the United States under 31 U.S.C. § 3730(a);

2) a *qui tam* action under 31 U.S.C. § 3730(b) brought by a whistleblowing relator on behalf of the relator and the United States; and

3) an employment retaliation claim action under 31 U.S.C. § 3730(h) filed by an individual employee.

Therefore, an action under 31 U.S.C. § 3730, which necessarily includes an action under 31 U.S.C. § 3730(h), is to be brought within six years of the date on which the underlying False Claims Act violation occurred.[11] Indeed,

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[11] For purposes of this brief, *amici* will refer to the basic six-year statute, not to the ten-year statute of repose that applies "when facts material" were not "reasonably. . .known. . ." 31
(continued...)

the legislative history explains that the False Claims Act whistleblower provision protects those who report fraud "in connection with false claims prosecutions." 132 CONG. REC. 22336.

Petitioner argues that, despite the Act's language, the six-year limitations period applies to every 31 U.S.C. § 3730 cause of action **except** to employment retaliation claims arising under 31 U.S.C. § 3730(h). Petitioner's argument, however, was rejected in the seminal opinion on 31 U.S.C. § 3730(h) claims, *Neal v. Honeywell, Inc.*, 33 F.3d 860, 865-866 (7th Cir. 1994) (other history omitted):

> How absurd!, Honeywell rejoins, to read the statute so that the time to file suit may expire before the retaliation occurs. If a firm submits a false claim early in 1991, an employee discovers the falsity in 1995, and the employer fires the whistleblower late in 1997, a suit under § 3730(h) would be untimely. Ever-solicitous of its ex-employees' right to sue it, Honeywell contends that § 3731(b)(1) cannot sensibly be applied to § 3730(h), and that we should therefore turn to state law--which, Honeywell believes, supplies a term of five years from the retaliation. Neal waited too long and must lose, Honeywell submits. Unlike Honeywell, however, we find no absurdity in the statute. Statutes of repose, increasingly common in tort cases, have the potential to block litigation before the tort occurs. Suppose the law bars suits filed more than ten years after the product's delivery. Then a person injured by a defect ten years and a day after sale lacks a remedy. The statutes of repose in federal securities laws may expire before a person discovers the fraud. *See*

[11] (...continued)
U.S.C. § 3731(b)(2).

> *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). If § 3731(b)(1) is another exhibit in this list, that would not condemn it as absurd. It would show only that Congress has opted for simplicity of administration. (It is easier to determine the date of a false claim than to pin down the time of retaliatory acts; the claim is a document, but arguments about retaliation depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication.) In most cases, of which this is an example, the false claims, the reports, and the retaliation will occur close in time, so starting the period of limitations with the false claim rather than the retaliation will leave employees ample time to protect their rights. Claims of employment discrimination under labor and civil rights laws must be made in less than a year. *See, e.g., DelCostello v. Teamsters*, 462 U.S. 151(1983); *Smith v. Chicago*, 769 F.2d 408 (7th Cir. 1985); 42 U.S.C. § 2000e-5(e). Whistleblowers are likely to have much more than that, as Neal did. It is possible, moreover, that equitable tolling or estoppel would apply to § 3731(b)(1) if the firm patiently waited until six years from the false claim and then sacked the troublesome employee. *Cf. Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990); *Davidson v. Western Illinois University*, 920 F.2d 441 (7th Cir. 1990).[12]

Petitioner's argument that the statute's plain language should be ignored is in derogation of the nearly unanimous rulings of the appellate courts, distorts the applicable legislative history of the 1986 False Claims Act Amend-

[12] *Neal*, 33 F.3d at 865-866.

ments and undermines the policy concerns that underlie the Act. Petitioner's interpretation, which attempts to remove 31 U.S.C. § 3730(h) from 31 U.S.C. § 3730, prejudices the individual employees and the Government by discouraging whistleblowers from coming forward to disclose fraud. Because the Fourth Circuit's decision respects the False Claims Act's language, honors the applicable legislative intent, and correctly protects whistleblowers from reprisals, the decision should be affirmed.

A. The False Claims Act's Express Statutory Language Supplies a Six-Year Limitations Period.

Petitioner's suggested reading of 31 U.S.C. § 3731(b)(1) excludes retaliation claims from the ambit of the only limitations provision in the False Claims Act, rewriting the language to state that "a civil action under Section 3730[(a) or (b)] may not be brought more than six years after the date on which the violation of Section 3729 is committed" and that actions under 31 U.S.C. § 3730(h) may not be brought more than 90 days to six years from when the allegedly discriminatory employment action occurred depending on the state law where the relator is or was employed.

First, contrary to Petitioner's argument that this Court should disregard the statutory limitations period and instead adopt an ever-changing landscape of state limitations period, Congress and this Court do not cavalierly adopt state statutory limitations periods for federal laws. As this Court previously observed: "The short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). As stated in *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-243 (1989):

> Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute. The task of resolving the dispute over the meaning of § 506(b) begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). In this case it is also where the inquiry should end, for where, as here, the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The language before us expresses Congress' intent -- that postpetition interest be available -- with sufficient precision so that reference to legislative history and to pre-Code practice is hardly necessary.

This Court further cautioned in a case involving the federal securities laws:

> . . .under a statute that also contains an express cause of action with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period. We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections. *See DelCostello*, 462 U.S. at 171; *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 69-70, (1981) (opinion concurring in judgment). When the statute of origin contains comparable express remedial provisions, the inquiry usually should be at an end. Only where no analogous counterpart is available should a court then proceed to apply

state-borrowing principles.[13]

"[W]hen the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). It would be absurd here to require the Court to set aside the language in a Congressionally-enacted statute in favor of a potpourri of inconsistent and, perhaps wholly inappropriate, state limitations. As this Court stated several decades ago:

> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 543 (1940). *See Caminetti v. United States*, 242 U.S. 470, 490 (1917). Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.'" *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-511 (1941)). This, however, is not the exceptional case.[14]

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[13] *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (other citations omitted).

[14] *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Every court of appeals decision, except for the Ninth Circuit's *Lujan* decision, *infra*, successfully applied the plain text of the False Claims Act statute of limitations provision to 31 U.S.C. § 3730(h) without producing an "absurd disposition." The issue before the Supreme Court can be decided solely on the plain text of the Act.

Congress tied the retaliation claim to a date six years after the last false claim was submitted by the defendant. This is not an absurd result, but merely an effort to establish ease of administering the statute, since the "claim" is a document and not subject to faulty or created memory. In addition, Petitioner's interpretation of 31 U.S.C. § 3730(h), which explicitly protects an employee acting "in furtherance" of a 31 U.S.C. § 3729 action, attempts to isolate the retaliation provision from the underlying 31 U.S.C. § 3729 False Claims Act violation provision. However, as the Fourth Circuit noted, no action of any type under 31 U.S.C. § 3730, including one under 31 U.S.C. § 3730(h), can proceed unless there has been an alleged violation of 31 U.S.C. § 3729. Thus, the language of 31 U.S.C. § 3729 is the common thread linking both provisions - 31 U.S.C. § 3730(h) and 31 U.S.C. § 3731(b)(1) - and undermines Petitioner's argument that 31 U.S.C. § 3729 has no bearing upon retaliatory discharge actions.

B. The Limitations Period Contained in 31 U.S.C. § 3731(b)(1) Applies to Employment Discrimination Actions Under 31 U.S.C. § 3730(h).

The Fourth Circuit's decision examined carefully the Seventh Circuit's decision in *Neal v. Honeywell, supra*. In *Neal*, the Seventh Circuit held that a suit under 31 U.S.C. § 3730(h) is an action under 31 U.S.C. § 3730. Although statutory language may create a burden for employers, this is a matter to be resolved by the political process, not the judiciary. Congress wanted to make employees feel more secure in reporting misconduct.

The Fourth Circuit's decision below also found that the statutory framework of the False Claims Act shows that Congress intended retaliation claims to be tied to violations of 31 U.S.C. § 3729. Calling this a "trigger" mechanism, the Fourth Circuit pointed out that a retaliation action will not lie unless it is connected with an allegation of a violation of 31 U.S.C. § 3729. Rather than signaling Congressional intent to exclude retaliation claims from the six-year statute, it merely ties an employee retaliation claim to some colorable violation of the False Claims Act. If plaintiffs-whistleblowers were required to show a judicially substantiated violation of 31 U.S.C. § 3729 before suit could begin (as Petitioner argues) no action could ever be perfected.

C. The Appellate Courts Have Applied the Text of 31 U.S.C. § 3731(b)(1) to 31 U.S.C. § 3730(h)

Petitioner's portrayal of the Fourth Circuit's decision as "deepen[ing] an existing conflict among the circuit courts" seizes upon language in the Ninth Circuit's *Lujan* decision as proof that statutory ambiguity demands a review of the legislative history. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998) (holding that, in retaliation claims under Section 3730(h), the applicable statute of limitations is taken from the "most closely analogous state statute," not the False Claims Act's statute of limitations provision). However, every court outside the Ninth Circuit that has addressed this issue has applied the False Claims Act's limitations provision without finding any statutory ambiguity. *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004); *United States ex rel. Malloy v. Telephonics Corp.*, 68 Fed. Appx. 270 (3d Cir. 2003), *cert. denied*, 158 L. Ed. 2d 469 (2004); *Neal, supra*; *accord, Kowalski v. Alpha Kappa Alpha Sorority*, 993 F. Supp. 619, 620-2 (N.D. Ohio 1997); *Grand ex rel. U.S.*, 811 F. Supp. at 335-337; *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 444 (E.D. Va. 2002); *United States ex rel. Mikes v. Strauss*, 889 F. Supp. 746, 753-754 (S.D.N.Y. 1995); *United States ex rel. Kent v. Aiello*, 836 F. Supp. 720, 723-724 (E.D. Cal. 1993); *United States ex rel. Cantekin v. University of Pittsburgh*, 1997 U.S. LEXIS 22868 (W.D. Pa., August 27, 1997).

II. A CONSISTENT AND ESTABLISHED STATUTE OF LIMITATIONS PERIOD IS CONSISTENT WITH CONGRESSIONAL INTENT AND THE POLICY OBJECTIVES OF THE FALSE CLAIMS ACT.

Even if the Court were to review the applicable legislative history, the Court would discover that the defendants' proposed statutory interpretation undermines the policy concerns behind the Act, especially the False Claims Act retaliation provision. In its 1986 amendments to the Act, Congress stressed "that few individuals will expose fraud if they fear their disclosures will lead to harassment, demotion, loss of employment or any other form of retaliation." *United States ex rel. McKenzie v. Bell South Telecommunications, Inc.*, 123 F.3d 935, 943-44 (6th Cir. 1997) (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5300). The statute, therefore, was enacted to assure a person who may wish to expose fraud that there will be protection from retaliation. *United States ex rel. Yesudian v. Howard University*, 153 F.3d 731, 736 (D.C. Cir. 1998).

Indeed, a relator's *qui tam* claim is often interrelated to his claim for retaliation. *See generally, United States, ex rel. Barbara Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115 (S.D. Ohio 1992) (noting that *qui tam* plaintiffs have standing because of the potential ramifications to their employment status by initiating an action under the False Claims Act). "Given the interrelatedness of the two

actions, Congress rationally concluded that the two actions should have identical statutes of limitation. Therefore, based upon the plain meaning of the statute, we conclude that [plaintiff] has filed a timely cause of action under 31 U.S.C. § 3730(h) for retaliation." *Grand ex rel. U.S.*, 811 F. Supp. at 336.

A. Consistency in Application of Statute of Limitations is Faithful to Congressional Intent.

Congress has demonstrated a clear preference for a consistent, easily administered statute of limitations. As this Court explained in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004):

> The practice of borrowing state statutes of limitation also forced courts to address the "frequently present problem of a conflict of laws in determining which State statute [was] controlling, the law of the forum or that of the situs of the injury." S. Rep. No. 619, 84th Cong., 1st Sess., 4-6 (1955) (discussing problems caused by borrowing state statutes of limitations for antitrust claims). Even when courts were able to identify the appropriate state statute, limitation borrowing resulted in uncertainty for both plaintiffs and defendants, as a plaintiff alleging a federal claim in State A would find herself barred by the local statute of limitations while a plaintiff raising precisely the same claim in State B would be permitted to proceed. *Ibid.*

By short-circuiting the False Claims Act's statute of limitations provision, Petitioner's recommended alternative of the "most closely analogous state limitations period" creates a disincentive for relators to file suit, particularly in states with limitation periods as short as 90 days. In addition, the uncertainty inherent in choice-of-law issues

and in the process of identifying which of several potentially applicable statutes is "most analogous" would further undermine the protection Congress intended in enacting 31 U.S.C. § 3730(h), by creating a difficult maze of state employment law to navigate, simply in order to determine whether an individual could assert retaliation protections for reporting or investigating financial and contracting fraud violations by a federal contractor or grantee.

B. Consistency in Section 3730 (h) is Part of an Overall Legislative Scheme.

The protections under 31 U.S.C. § 3730(h) are central to a coherent fraud enforcement scheme. Although a handful of *qui tam* relators have achieved substantial financial success as a result of their whistleblowing activities, most individuals involved in assisting the United States in False Claims Act actions will not be so fortunate–most will not even be *qui tam* relators. Thus, the Government needs to be able to point to consistent statutory employment protections for witnesses and others who cooperate and assist them in their investigative efforts. Government agents investigating False Claims Act violations should not be expected to become experts in the nuances of state employment and whistleblower law simply in order to assure a witness or other person that they have meaningful job protections if they assist the United States. The consequences of a cooperating witness being misadvised, and then losing the anti-retaliation protections, could lead to the unintended and unfortunate result of a withdrawal of cooperation.

Even as to *qui tam* relators, the employment protections afforded under the False Claims Act may provide far more important relief than the prospect of future monetary damages. The False Claims Act is fraught with procedural and practical obstacles that can diminish a *qui tam* rela-

tor's recovery, even though the claims asserted under 31 U.S.C. § 3729 are meritorious and liability against the defendant is established.[15] Relators have no assurance of a substantial recovery, but the provisions of 31 U.S.C. § 3730(h) were intended to assure that no matter the outcome of the *qui tam* claims, the relators should remain employed, their mortgages paid, and their families fed during the litigation.

The risks for the whistleblower, in cooperating with the United States or in filing a *qui tam* action, cannot be understated. As a result of the 1986 Congressional amendments to the False Claims Act, *qui tam* actions are subject to several statutory bars, most of them termed jurisdictional, that can block otherwise meritorious claims from being pursued by a *qui tam* whistleblower.

The 1986 amendments to the False Claims Act were intended to encourage private enforcement suits by legitimate whistleblowers while barring suits by opportunistic *qui tam* plaintiffs who base their claims on matters that were previously the subject of public government investigations or were otherwise in the media. The primary bar is a "public disclosure" jurisdictional bar, providing that the courts may not entertain jurisdiction over any *qui tam* claims that were "publicly disclosed[16]." Most

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[15] *See* Lugbill, A., Section 2.85, False Claims Act *Qui Tam* Suits and False Claims Act Employee Whistleblower Protections, *"Litigating Wrongful Discharge Claims,"* (West 2003).

[16] *Hughes Aircraft Co. v. United States*, 520 U.S. 939, 950-1 (1997) (jurisdictional statute); *United States ex rel. Feingold v. Adminastar Federal, Inc.*, 324 F.3d 492 (7th Cir. 2003)(provision is labeled jurisdictional, but is actually substantive); *See generally, United States ex rel. Stone v. Rockwell International Corp.*, 282 F.3d 787 (10th Cir. 2002); *United States ex rel. Minnesota* (continued...)

courts interpret the Act's jurisdictional bars as permitting the Department of Justice, but not the relator, to pursue the claims.[17] "Where the *qui tam* suit is based upon 'allegations or transactions' which already have been 'publicly disclosed'". . . "in a criminal, civil, or administrative hearing in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation or from the news media," only an "original source" can bring a *qui tam* action.[18] These "public disclosure" provisions bar *qui tam* cases brought by persons other than an "original source." An "original source" is an individual who has "direct and independent knowledge of the information

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[16] (...continued)
Association of Nurse Anesthetists v. Allina Health Systems Corp., 276 F.3d 1032, 1040-43 (8th Cir.), *cert. denied*, __ U.S. __, 154 L. Ed. 2d 252, 123 S. Ct. 345 (2002); *United States ex rel. Dhawan v. New York Medical College*, 252 F.3d 118, 121-122 (2d Cir. 2001); *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1163 (10th Cir. 1996); *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3d Cir. 1999), cert. denied, 529 U.S. 1018 (2000); *United States v. Bank of Farmington*, 166 F.3d 853, 863 (7th Cir. 1999); *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326, 335 (6th Cir. 1998); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1521 (10th Cir. 1996); *United States ex rel. Devlin v. California*, 84 F.3d 358, 360, 363 (9th Cir. 1996); *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994); *United States ex rel. Springfield Terminal Railway Co. v. Quinn*, 14 F.3d 645, 649-51 (D.C. Cir. 1994); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1152-54 (3d Cir. 1991).

[17] *But, see, United States ex rel. Hays v. Hoffman*, 325 F. 3d 982 (8th Cir. 2003)(finding both relator and the United States barred from pursuing claims if there was a public disclosure).

[18] 31 U.S.C. § 3730(e)(4)(A)

upon which the allegations are based and has voluntarily provided the information to the Government" prior to filing a *qui tam* action.[19] The *qui tam* provisions also contain a "first to file" rule prohibiting subsequently-filed actions that allege the same legal violations. 31 U.S. C. § 3730(b)(5); *see United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214 (D.C. Cir. 2003). Finally, a *qui tam* action cannot be based on allegations already the subject of a federal civil suit or a federal administrative civil money penalty proceeding in which the federal government is a party[20]; this provision seeks to prevent so-called "parasitical" actions that try to unfairly exploit pre-existing Government efforts to pursue false claims.

The legislative history shows that Congress was originally contemplating creating a new section for the retaliation claims, but instead opted to include them within 31 U.S.C. § 3730. Relocating the retaliation claims to the section dealing with the handling of other false claims reinforces the conclusion that Congress intended that the retaliation claims would have the same statutes of limitations as all other False Claims Act claims.

These jurisdictional, "first-to-file," and related provisions encourage a well-informed whistleblower, particularly one represented by experienced counsel, to offer information to the Department of Justice about the False Claims Act violations even before a *qui tam* action is filed and, often, before any employment retaliation occurs. The *qui tam* provisions and the public disclosure bar act also as a disincentive for employee whistleblowers to impair the Government's investigatory abilities, as can happen when the first disclosures of fraud occur in the public press, rather

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[19] 31 U.S.C. § 3730(e)(4)(B); *See United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699, 703 (8th Cir. 1995).

[20] 31 U.S.C. § 3730(e)(3).

than directly to appropriate Government investigators and prosecutors. A whistleblowing employee who informs federal investigators promptly may avoid employment retaliation for years, as the Government pursues witnesses and information without the glare of publicity and the *qui tam* case, if one is filed, remains sealed. Given the very substantial risks that *qui tam* litigation will not be successful, the employment protections are critical to the success of the statutory scheme.

C. Adoption of State Limitations Periods is Contrary to Supreme Court Precedent.

No law provides that a statute of limitations, once specified by Congress, should be set aside in favor of state limitations. Cases that discuss adopting state statutes of limitations refer to a "void," an absence of federal direction. *See, e.g., Bd. of Regents v. Tomanio*, 446 U.S. 478, 483 (1986) ("Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983 – a void which is commonplace in federal statutory law.")

The position advocated by Petitioner, that this Court ignore the statute of limitations contained in 31 U.S.C. § 3731(b) and instead apply state statutes of limitations, is contrary to the trend advocated by this Court, the Congress, and practitioners. In the last session, this Court examined the litigation chaos that can ensue when the federal courts attempt to apply state statutes of limitation to federal employment and tort claims, as occurred in the 1980's with 42 U.S.C. § 1981:

> Prior to the enactment of § 1658, the "settled practice was to adopt a local time limitation as federal law if it [was] not inconsistent with federal law or policy to do so." *Wilson v. Garcia*, 471 US 261,

266-267(1985). Such "[l]imitation borrowing," *Board of Regents v. Tomanio*, 446 US, at 484, generated a host of issues that required resolution on a statute-by-statute basis. For example, it often was difficult to determine which of the forum State's statutes of limitations was the most appropriate to apply to the federal claim. We wrestled with that issue in *Wilson v. Garcia*, in which we considered which state statute provided the most appropriate limitation principle for claims arising under 42 U.S.C. § 1983 [42 USCS § 1983]. 471 US, at 268, 276-279 (resolving split of authority over whether the closest state analogue to an action brought under § 1983 was an action for tortious injury to the rights of another, an action on an unwritten contract, or an action for a liability on a statute). Before reaching that question, however, we first had to determine whether the characterization of a § 1983 claim for statute of limitations purposes was an issue of state or federal law and whether all such claims should be characterized in the same way. *Ibid.* Two years later, in *Goodman v. Lukens Steel Co.*, we answered the same three questions for claims arising under § 1981. 482 US, at 660, 661-662. Both decisions provoked dissent and further litigation.

Jones, 541 U.S. at 370 (2004). Under *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987), federal courts were to determine and apply "the most appropriate or analogous state statute of limitations" for Section 1981 claims. Indeed, in sharp contrast to the situation that is before the Court in *Qui Tam* Relator Wilson's case, in enacting Title 42, Congress explicitly instructed the courts to look to state law as to any aspects of law that were not provided by Congress. *Robertson v. Wegmann*, 436 U.S. 584, 585 (1978). However, following the *Goodman* decision, Congress enacted a catchall

four-year statute of limitations for actions arising under federal statutes enacted after December 1, 1990. 28 U.S.C. § 1658. This catchall provision now applies to claims that "arise under" the 1991 amendments to the Civil Rights Act of 1866. *Jones, supra.*

D. Adoption of State Limitations Periods Will Create Inconsistent Time Periods and Introduce Needless Uncertainty Into an Area Where Congress Wanted and Supplied a Definite Time Period Within Which to Bring Claims.

The False Claims Act statute of limitations set forth in 31 U.S.C. § 3731(b)(2) is six years, but it has a tolling provision that prevents the statute from running until the Government knew or should have known of the facts, up to a maximum of ten years from the date of the violation. This applies to both the Government and a *qui tam* relator. Moreover, many Government contracts last for many years and are not finally "closed out" until months or years after most of the work was completed. This could extend, for many years, the time period when a case can be brought, retaliation can occur, and a meritorious retaliation claim can be asserted.

The statute of limitations in the federal False Claims Act is part of a legislative scheme that allows claims arising under government contracts to be brought within six years of the damage to the Government. Before the 1986 amendments to the False Claims Act, a six-year statute of limitations also applied. A parallel provision is contained in the provisions of 28 U.S.C. § 2415.

In contrast to the single limitations period in the False Claims Act, many states have more than one statute of limitations that applies to violations akin to the employee

retaliation protections of the False Claims Act and a few have state False Claims Acts with employee whistleblower protections.[21] However, unlike the statutes at issue in *Goodman*, there is no Congressional directive to apply state law at all. First, a number of states have both state common law actions analogous to Section 3730(h), such as wrongful discharge, breach of duty of good faith, or public policy exceptions to the employment-at-will doctrine, as well as statutory whistleblower and related retaliation protections.[22] Many are subject to general state statutes of limitations for torts, typically ranging from one to six years.[23] Second, a

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[21] *See, e.g.*, Cal. Gov't Code § 12653(b) (retaliation provision modeled after the federal False Claims Act retaliation provision). *See also* Del. Code. Ann. §§ 1201 *et seq.*; D.C. Code Ann. 2-308-14; Fla. Stat Ann. § 68.083(1); Hi. Rev. Stat. Ann. §§ 661-21 *et seq.*; 740 Ill. Comp. Stat. Ann. §§ 175/4(b); Mass. Gen. Laws Ann. ch. 12, § 5C(2); Nev. Rev. Stat. § 357.070-080; Tenn. Code Ann. §§ 4-18-101 *et seq.*; Va. Code Ann. §§ 8.01-216.5; Ar. Code Ann. § 20-77-902; Tex. Hum. Res. Code Ann. §§ 36.101 *et seq.*; Mich Comp. Laws §§ 15.361; Idaho St. §§ 6-2101 *et seq.*; Ohio Rev. Code Ann. §§ 4113.52 *et seq.*

[22] *See generally* Charles J. Muhl, The Employment-At-Will Doctrine: Three Major Exceptions, Monthly Lab. Rev., Jan. 2001,at 3, available at *http://www.bls.gov/opub/mlr/2001/01/art1full.pdf* (providing a chart, current to October 1, 2000, showing 43 states recognizing public policy exceptions to the employment-at-will doctrine; 11 allowing breach of the duty of good faith actions in the employment context; and 38 having implied contract exceptions to the employment-at-will doctrine. Only Florida, Georgia, and Rhode Island were reported as without such statutes.).

[23] *Sabine Pilot Service, Inc.*, 687 S.W.2d 733; 1985 Tex. LEXIS 755; 28 Tex. Sup. J. 339 (1985).

Harris v. Miss. Valley State University, 873 So. 2d 970, 985 (Mississippi 2004); *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26-27 (Miss. 2003); *McArn v. Allied Terminix*

(continued...)

number of state legislatures have enacted specific whistleblower employment and employment-related retaliation laws, frequently a number of statutes in a single state,[24] protecting a wide variety of public interest whistleblowing activities.[25] These statutes of limitations also vary, with

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[23] (...continued)
Co., 626 So. 2d 603, 606-07 (Miss. 1993).

[24] The Texas Supreme Court noted that ". . ..the Legislature has been active in crafting whistleblower statutes that often vary from one another in material respects. . .." *City of Midland v. O'Bryant*, 18 S.W.3d 209, 216, 43 Tex. Sup. J. 884 (2000). Mississippi has a whistleblowing statute protecting public employees in blowing the whistle to state government officials, but requires exhaustion of internal remedies prior to bringing suit. Miss. Code Ann. § 25-9-173 (2004). No statute of limitations exists within the statute and the time limits and exhaustion requirements appear to depend upon those applicable to the general time limits for Mississippi public employees' grievances or suits. *See, e.g., East Mississippi State Hospital v. Callens, rehearing denied*, 2004 Miss. LEXIS 361 (2004), 2005 Miss. LEXIS 119 (February 17, 2005) (Mississippi Supreme Court).

[25] California, for example, has a very broad whistleblower retaliation statutory scheme, that extends protections to, *inter alia*, any employee who disclosed information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information disclosed a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation; refused to participate in an activity that would result in a violation of state *or* federal statute, or a violation or noncompliance with a state or federal rule or regulation. Cal Lab Code § 1102.5.

Like many state employment codes, the time limits for bringing an action under the California whistleblower statute are not contained within the statute itself, but are found elsewhere. *See, e.g.*, Cal Lab Code § 1102 *et seq.* (2005); *See* Cal. Lab. Code §2699

(continued...)

some having limits as short as 180 days.[26]

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[25] (...continued)
et seq. (2005).

New York provides for retaliation protections for private employees and also provides that such actions are to be brought within one year of the alleged retaliatory action, except that health care employees have two years within which to bring suit. NY CLS Labor §§ 740.2, 740.4 (2004).

[26] Florida's employee whistleblower statutory scheme imposes a 2 year statute that may be tolled for up to 4 years. Fla. Stat. § 448.103(1)(a)(2) (2004).

Minnesota's whistleblower protection laws have no statute of limitations and is presumably subject to the catch-all 6-year period in Minn. Stat. § 541.05 (2004) for statutory causes of action. On the other hand, it could be argued that in a *qui tam* action the appropriate statute is the two-year statute for torts, as that is the statute employed in 42 U.S.C. 1983 actions in Minnesota. Minn. Stat. § 541.07 (2004).

Montana's Wrongful Discharge from Employment Act has a one year statute of limitations, but that time limit may be extended for up to 120 days if the employer has a written appeal process. MCA § 39-2-911 (2004).

New Jersey's Conscientious Employee Protection Act has a one year statute of limitations. NJ Stat. § 34:19-5 (2004).

Ohio Rev. Code 4113.51 et seq. ("Ohio Whistleblower Act") provides a 180-day statute of limitations for employment retaliation claims arising thereunder. However, Ohio wrongful discharge public policy common law claims, known as "Greeley" tort claims, are subject to a six-year statute of limitations applicable to miscellaneous actions for which there was no specific statutory action.

(continued...)

Third, there are many state and federal employment retaliation statutes encompassing activities related to investigation of, asserting, or testifying in a matter involving employment discrimination, whistleblowing, public policy claims, speech on matters of public interest. These statues vary widely containing individualized coverage schemes thereby creating the possibility that False Claims Act *qui tam* relators who work together, even in the same state or in different states, could be subject to very different time periods for bringing an action, depending upon the peculiarities of state law.[27]

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[26] (...continued)
The Rhode Island Whistleblowers Protection Act has a 3 year statute of limitations. R.I. Gen. Laws § 28-50-4 (2004).

The Texas "Protection for Reporting Violations of Law" applicable to public employees has an initial 90 day statute of limitations, with a tolling of the statute where the violation was not reasonably known to the employee or while required internal administrative proceedings are ongoing. Tex. Gov't Code § 554.005 (2004); Tex. Gov't Code § 554.006. Where internal remedies have not succeeded, there are only 30 days to proceed to bring a lawsuit. Tex. Gov't Code § 554.006.

[27] Montana's Wrongful Discharge from Employment Act only applies to discharges and constructive discharges, not to other retaliatory actions. MCA § 39-2-903 (2004). Montana's statute does not apply to probationary employees and, in some situations, to those hired within 6 months of the termination. MCA § 39-2-904 (2004). Texas's statutory scheme protects from retaliation any employees who have hired a lawyer to represent them in a claim, although its application to *qui tam* plaintiffs is uncertain. Tex. Lab. Code § 451.001 (2004). Texas's "Protection for Reporting Violations of Law" also protects certain public employees from retaliatory actions for certain kinds of whistleblowing to governmental authorities. Tex. Gov't Code § 554.002 (2004).

The Congressional intent of increasing the security of employees who report misconduct is ill-served by a scheme which affords a statutes of limitations as short as 180 days, such as under Texas and Ohio law. This would undermine the False Claims Act's purposes. As stated by the Court in *Occidental Life Ins. Co. v. Equal Employment Opportunity Commission*, 432 U.S. 355, 367, 368-369 (1977):

> But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson v. Railway Express Agency*, 421 U.S. 454, 465. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute. *Ibid.; Auto Workers v. Hoosier Cardinal Corp., supra*, at 701; *Board of County Comm'rs v. United States*, 308 U.S. 343, 352.

Accord, Holmberg v. Armbrecht, 327 U.S. 392 (1946) (equity and laches can still operate to bar claim brought timely under statute of limitations if unfair to defendant).

Moreover, under existing authority, litigants who are now relying upon the six-year statute in the False Claims Act face loss of the retaliation protections retroactively,[28]

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[28] *See, e.g., Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749 (1995) and the concurring opinions therein, discussing some of the complex issues that can arise when this Court enunciates a new rule involving statutes of limitations, selection of appropri-

(continued...)

creating years of uncertainty while district and appellate courts wrestle with most analogous state law issues, only to have those rulings change due to the rapidly developing and ever-changing state statutory schemes for public policy and whistleblower protections and the eventual development of established Supreme Court precedent.[29]

Furthermore, it is common practice in False Claims Act litigation to include 31 U.S.C. § 3730(h) claims in False Claims Act complaints filed under seal. Indeed, it would be essentially malpractice to file a 31 U.S.C. § 3730(h) claim before a claim under 31 U.S.C. § 3730(b) was filed, risking a ruling that the public disclosure jurisdictional bar required dismissal of the *qui tam* portion of the complaint, as specified in 31 U.S.C. § 3730(e)(4). Petitioner's reading of the statute would force the relator to choose between prematurely filing both actions or completely foregoing her retaliation claim. Congress did not intend to achieve such a confounding result. As the legislative history behind the 1986 Amendments reveals, the False Claims Act's extended statute of limitations provision is needed to "ensure the Government's rights are not lost through a wrongdoer's successful deception," because "fraud is, by nature, deceptive

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[28] (...continued)
ate state statutes, tolling issues under state law, and retroactivity issues with newly-announced statutes of limitations.

[29] "On the same day we decided *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 115 L. Ed. 2d 481, 111 S. Ct. 2439 (1991), in which a majority of the Court held, albeit in different opinions, that a new rule of federal law that is applied to the parties in the case announcing the rule must be applied as well to all cases pending on direct review." *Plaut v. Spendthrift Farm*, 514 U.S. 211, 214 (1995) (citing *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 92, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993)).

. . ." S. Rep. No. 99-345, at 15 (1986). Perhaps this is why Congress expressly extended the six-year statute of limitations provision to all three causes of action provided by 31 U.S.C. § 3730.

CONCLUSION

The Fourth Circuit's decision applying the six-year limitations period to claims arising under 31 U.S.C. § 3730(h) should be affirmed. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson v. Garcia,* 471 U.S. 261, 266 (quoting *Chardon v. Fumero Soto,* 462 U.S. 650, 667 (1983)).

Petitioner's argument that state law should supply the limitations period for federal whistleblower protections is not based on common sense nor sound legal principles. "State legislatures do not devise their limitations periods with national interests in mind," but "it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. of California v. EEOC,* 432 U.S. 355, 367 (1977).

Accordingly, NELA and TAFEF respectfully request that the Court affirm the Fourth Circuit's ruling that the applicable limitations period for False Claims Act employment retaliation claims under 31 U.S.C. 3730(h) is the six-year period found in the False Claims Act.

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No. 04-169

In the Supreme Court of the United States

GRAHAM COUNTY SOIL &
WATER CONSERVATION DISTRICT, ET AL.,
Petitioners,

v.

UNITED STATES EX REL. KAREN T. WILSON,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Fourth Circuit

BRIEF OF NATIONAL WORKRIGHTS INSTITUTE *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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QUESTION PRESENTED

Whether the six year limitation period set out in 31 U.S.C. § 3731(b) should be applied to retaliatory discharge actions under the False Claims Act or whether courts should apply the most closely analogous state limitation period?

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INTEREST OF AMICUS CURIAE

The National Workrights Institute ("NWI") respectfully submits this brief in accordance with Supreme Court Rule 37.3.[1] NWI is a nonprofit organization formed in January 2000 with a mission to be the one major human rights organization that commits its entire effort to workplace issues. NWI's stated goal is to improve the legal protection of human rights in the workplace, and NWI has engaged in a wide variety of activities designed to expand those rights. In connection with its public education efforts, NWI's staff has appeared more than 2,000 times in both the print and electronic media, and NWI and its predecessor entity[2] also have promoted laws designed, among other things, to prohibit employers from penalizing private employee behavior that does not affect job performance, to limit employers' electronic surveillance of employees, to ban workplace genetic

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents are being filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than *amicus curiae*, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The original National Workrights Institute was founded in 1988 by the American Civil Liberties Union ("ACLU"). NWI was founded in January 2000 by former staff of the ACLU's National Taskforce on Civil Liberties in the Workplace. NWI is an independent 501(c)(3) organization, and is no longer affiliated with the ACLU, which is not a party to this *amicus curiae* brief. Additional information on the mission and goals of NWI may be found on its website. *See* http://www.workrights.org.

discrimination, to limit indiscriminate drug testing, to provide workers with due process rights in employment arbitrations, and to promote workers' rights to organize.

SUMMARY OF ARGUMENT

NWI takes no position on which party should prevail on the merits of this case. NWI files this brief as *amicus curiae*, however, to encourage this Court to adopt a new legal paradigm when interpreting statutes of limitations. The legal protection of human rights in the workplace will be enhanced overall by having statutes of limitations construed in a manner that promotes their underlying core principles, including conceptual reasonableness, fairness, predictability, and a positive practical impact.

ARGUMENT

In *United States ex rel. Wilson v. Graham County Soil & Water Conservation District*, 367 F.3d 245 (4th Cir. 2004), the court of appeals held that the statute of limitations applicable to anti-retaliation claims brought under 31 U.S.C. § 3730(h) of the False Claims Act ("FCA") is the six-year limitations period set forth in 31 U.S.C. § 3731(b)(1), which accrues on the date of the underlying false claim, rather than the most analogous state statute of limitations, which would begin to run on the date of the retaliatory act. In reaching this decision, the court of appeals "introduce[d] an unprecedented oddity into state and federal law by disconnecting the statute of limitations for anti-retaliation claims from the actual retaliatory acts themselves." *Id.* at 257 (Wilkinson, J., dissenting).

By decoupling the claim from the injury, the court of appeals unnecessarily created uncertainty in workers' legal rights, even raising the prospect of a limitations period expiring before a cause of action for retaliation accrues. In deciding whether to adopt this interpretation, NWI encourages this Court to move toward a judicial construct in which the Court will henceforth evaluate statutes of limitations in a manner that promotes their underlying purposes. The language of § 3731(b) does not foreclose this type of analysis in the instant case, and NWI urges this Court to engage in such an evaluation here.

I. Section 3731(b)(1)'s Federal Statute of Limitations Does Not Plainly Cover Anti-Retaliation Claims Under the FCA

The FCA anti-retaliation statute, 31 U.S.C. § 3730(h), does not itself contain a statute of limitations. The court of appeals, however, ruled that Congress had supplied one through the operation of 31 U.S.C. § 3731(b)'s plain language. Section 3731(b) provides a six-year statute of limitations for a "civil action under section 3730." The court of appeals held that this clause necessarily includes a civil action filed under § 3730(h). As Judge Wilkinson's dissent and a unanimous panel of the Ninth Circuit both note, however, "[t]he answer is not so simple." *Wilson*, 367 F.3d at 358 (Wilkinson, J., dissenting); *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1034 (9th Cir. 1998). In fact, "the majority's purported plain language interpretation lops off half the statute." *See Wilson*, 367 F.3d at 358 (Wilkinson, J., dissenting)). Section 3731(b) goes on to state that applicable claims

are barred "6 years after the date on which the violation of section 3729 is committed." The reference to a "violation of section 3729" shows that Congress intended the six-year limitations period in § 3731(b)(1) to apply only to claims under § 3730 that arise from a violation of § 3729 (*i.e.*, actions by the Attorney General under § 3730(a) and *qui tam* actions by individuals under § 3730(b)). "Section 3729 specifically and strictly addresses false claims, not retaliation claims." *Lujan*, 162 F.3d at 1035. Viewed as a whole, then, § 3731(b)(1)'s applicability to § 3730(h) anti-retaliation claims is far from "plain." As noted by Judge Wilkinson, "an employer may wrongfully retaliate against a whistle-blowing employee even in the absence of section 3729 violations." *Wilson*, 367 F.3d at 258 (Wilkinson, J., dissenting). *See also United States ex rel. Ackley v. IBM*, 110 F. Supp. 2d 395, 402 (D. Md. 2000) (employee "could be retaliated against even if false claims were never actually made or not proven or if the timing of their occurrence were indeterminate.").

Perhaps recognizing this problem, and striving to avoid an interpretation of the statute in this situation that could "leave this statute of limitations without a starting point," *Wilson*, 367 F.3d at 258 (Wilkinson, J., dissenting), the court of appeals notes that "an action under § 3730 will not lie absent an *alleged* violation of § 3729." *Wilson*, 367 F.3d at 251 (emphasis added). This word "alleged," however, is nowhere found in § 3731(b)(1). The court of appeals thus essentially rewrites the statute to avoid a conclusion that the law cannot reasonably support – one in which a mere statute of limitations would change the scope of the substantive

law, by limiting anti-retaliation claims to situations where actual violations of § 3729 are established – nullifying the broader, express terms of § 3730(h) itself. *See* 31 U.S.C. § 3730(h) (barring retaliation linked to any "lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, or assistance in an action filed or to be filed under this section").[3] That the court of appeals finds it necessary to add this absent word to the statute to try to support its interpretation – despite the statute's supposed plain meaning – only clarifies that Congress' intent to have § 3731(b) cover anti-retaliation claims is anything but plain.

As Judge Wilkinson notes, the court of appeals' suggestion of plain meaning also fails to account for a legislative change in the law. The pre-1986 version of § 3731(b) stated that § 3730 actions must be filed "within 6 years from the date the violation is committed." Section 3730(h)'s anti-retaliation claim was added in 1986. At the same time, "Congress narrowed the applicability of the statute of limitations to 'violations of section 3729,'" making clear that § 3731(b) only governed claims arising from violations of section 3729. *Wilson*, 367 F.3d at 259 (Wilkinson, J., dissenting). The court of appeals' ruling thus "suggests

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[3] Elsewhere, the court of appeals inconsistently suggests that the limitations period for FCA anti-retaliation claims will begin to run "when the violation of § 3729, to which such violations of 3730(h) must be tethered, is *found* to *have occurred*." 367 F.3d at 251 (emphasis added). The majority never attempts to explain, however, how this narrowed view of § 3730(h)'s scope can be reconciled with the broader language of § 3730(h) itself.

that this statutory change is meaningless and contravenes the well-established rule that '[w]hen Congress alters the wording of a statute, we must presume Congress intended a change in the law.'" *Id.* (Wilkinson, J., dissenting) (citations omitted).

At a minimum, it cannot unambiguously be said that Congress created an express federal statute of limitations for FCA anti-retaliation claims that "is at odds with all statutes of limitations for wrongful discharge, which commence with the occurrence of the retaliatory act." *Id.* at 260 (Wilkinson, J., dissenting). Even Respondent concedes "it seems likely that Congress drafted the statute carelessly, and never considered what limitations period might apply to the new cause of action for retaliatory discharge." Brief in Opposition to Petition for a Writ of Certiorari, 2004 WL 2678646, at *11 (suggesting a "mistake"). *Cf. United States v. Granderson*, 511 U.S. 39, 52-53 (1994) (finding ambiguity after noting how it appeared Congress may have been acting under a mistaken understanding of the law). A conclusion that Congress did not enact a statute of limitations expressly designed to cover FCA anti-retaliation claims can credibly be presented as the "interpretation which can most fairly be said to be imbedded in the statute, in the sense of being harmonious with its scheme and with the general purposes that Congress intended." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984). Moreover, even if the language of § 3731(b) were more plain in its coverage of FCA anti-retaliation claims, this Court could still evaluate the factors NWI suggests below, on the theory that the court of appeals' "literal application would frustrate the statute's purpose or lead to an absurd

result." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). *See also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 454-55 (1989) (court should not enforce plain meaning of a statute if it would lead to an absurd or odd result);[4] *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892) (seminal case adopting this canon of statutory construction).

II. This Court Should Adopt a Legal Framework Designed to Foster The Underlying Goals of Statutes of Limitations Generally

If this Court determines that § 3731(b)(1)'s language does not compel a particular conclusion, as NWI suggests, it should then turn to a consideration of the nature of statutes of limitations generally. In this regard, NWI submits that any interpretation of statutes of limitations necessarily should include a review for certain core objectives, so that each statute of limitations will promote (1) conceptual reasonableness, (2) fairness, (3) predictability, and (4) a positive practical impact.

A. Statutes of Limitations Should be Conceptually Reasonable

The underlying concept of a statute of limitations is that a plaintiff has only a limited amount of time to file

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[4] While the opinions in *Public Citizen* may suggest a difference between "absurd" and "odd" results produced by a statute's plain meaning, this Court has not clearly articulated the distinction, and lower courts appear to use the terms interchangeably. *See, e.g., Hercules, Inc. v. EPA*, 938 F.2d 276, 281 (D.C. Cir. 1991) (plain meaning should not be applied if it would produce an *odd* result).

a claim. This principle necessarily dictates that the statute should start to run on the date when the plaintiff could first file his or her claim. Having a statute of limitations run from any other date is conceptually illogical.

In evaluating this factor, this Court will necessarily need to address what Judge Wilkinson noted below, and what no one denies: that the court of appeals' interpretation of § 3731(b) raises the prospect of what perhaps can be described as the ultimate absurdity in the law of limitations, in which a statute "may preclude challenges to retaliatory acts under section 3730(h) before that cause of action has even accrued." *Wilson*, 367 F.3d at 257 (Wilkinson, J., dissenting). *See id.* at 260 ("[T]he idea that a statute of limitations could expire even before the cause of action comes into being is not one that we should jump to conclude that Congress intended to embrace."). *See also United States ex rel. Truong v. Northrop Corp.*, 1991 WL 496831, at *2 (C.D. Cal. 1991) ("Congress cannot have meant for an employee's private claim against an employer to be time-barred *before* that employee suffers the retaliation") (emphasis in original). Indeed, from this "conceptual" perspective, even some lower courts in accord with the court of appeals' decision nevertheless concede that "[t]here may be circumstances in which application of the Congressionally-prescribed limitation periods contained in 31 U.S.C. § 3731(b) would engender uniquely harsh, unfair, or even 'absurd' results." *Storey v. Patient First Corp.*, 207 F. Supp. 2d 431, 446 (E.D. Va. 2002).

The court of appeals resisted characterizing these results as absurd, and this Court should carefully

consider and evaluate those arguments. In this regard, however, "the majority states that Congress was, in effect, enacting a statute of repose." *Wilson*, 367 F.3d at 259 (Wilkinson, J., dissenting). Viewed from a "conceptual" perspective, there can be no doubt that "[s]ection 3731(b) is self-evidently a statute of limitations." *Id.* (Wilkinson, J., dissenting). The majority's odd attempt to blend these concepts seems striking in a decision that purports to rely on "plain" language. The court of appeals' suggestion that a statute of limitations can be upheld as reasonable if it simply has the same effect as a statute of repose defies clear legal distinctions in the two concepts. Repose examines only the perspective of an employer, whereas a statute of limitations also focuses on the employee, and the date on which fair notice of a claim was received. Combining the two could create a troubling precedent, potentially diminishing the human rights of these employees by excusing their lack of notice simply because an employer might gain repose. *Id.* at 257 (Wilkinson, J., dissenting) (court of appeals "fails to give employees adequate notice concerning when the statute of limitations begins").

B. Statutes of Limitations Should be Fair

NWI also submits that statutes of limitations should be construed in a manner that promotes fairness. In evaluating this factor, this Court again must necessarily consider, among other things, the fact that the court of appeals' holding may produce additional odd and potentially unfair scenarios. In a single company, for instance, one employee might be fired three years after a false claim, while another (perhaps even the successor

employee) is fired two years later. At least one court has suggested that "[i]t is both unreasonable and unfair for identically situated plaintiffs to be held to widely varying periods of limitation because the accrual date for the limitations period is unrelated to their claim." *Truong*, 1991 WL 496831, at *2.

In considering this "fairness" factor, this Court should consider the court of appeals' suggestion that, in appropriate circumstances, "the doctrines of equitable tolling or equitable estoppel may provide relief." *Wilson*, 367 F.3d at 253. At the same time, however, this Court must factor in the potential confusion such procedures may create for employers, *see id.* at 260-61 (Wilkinson, J., dissenting) (this suggestion "undermines the value of having a statute of limitations in the first place"). This Court must also consider whether equitable, case-specific doctrines such as equitable tolling or estoppel are adequate to protect the human rights of employees. The very purpose of limitations periods is to provide certainty with respect to potential claims, which benefits both employers and employees. Equitable doctrines such as those suggested by the court of appeals are designed for scenarios in which a limitations period has run, but there exist additional equitable reasons why a given claim should be deemed timely. This Court may decide that such doctrines were never designed to supplant statutes of limitations, as they are no substitute for the certainty of a statutory period. As noted above, an equitable doctrine is not a legal right at all, but merely a hope that a judge "may" exercise what Judge Wilkinson characterized as "unpredictable discretion." *Id.* at 261 (Wilkinson, J., dissenting).

This Court also should evaluate this equitable tolling doctrine from a practical perspective. The court of appeals explained that an employee might obtain such equitable relief by proving that a retaliation after the limitations period expired was "the consequence of a deliberate design by the employer." *Id.* at 254. On the other hand, the manner in which an employee is supposed to establish this difficult and additional burden is never explained. Such evidence would seem to require the records or testimony of others outside the employee's control. Before ever obtaining the right to compulsory process that might unearth such a smoking gun, an employee may face "[l]awyers [who] may be reluctant to take on late challenges to retaliatory actions if there is only a chance that judges will exercise equitable tolling powers to recognize them." *Id.* at 261 (Wilkinson, J., dissenting). Fired whistleblowers can face extreme feelings of powerlessness, and this Court should evaluate whether predicating their legal rights at that stage on a mere "hope" of judicial beneficence is sufficient.

In evaluating this "fairness" factor, however, the court of appeals is certainly correct that, if FCA whistleblowers must rely on analogous state limitations periods, many will face a limitations period far shorter than the six years available under the FCA. Some of the analogous state law statutes of limitations that might be found applicable to FCA claims in this context, such as the 180-day provisions that apparently exist in Texas and Ohio, *see Wilson*, 367 F.3d at 255 (citing statutes), appear unfairly truncated. The suggestion made in the Petition for a Writ of Certiorari, 2004 WL 1752183, at *15 & 20, that six years is inherently too long to give

an employee to file an anti-retaliation claim, is baseless.[5] It is true that that analogous state statutes of limitations are often used in connection with other federal anti-retaliation claims such as 42 U.S.C. § 1981 and ERISA § 510 (29 U.S.C. § 1140), *see, e.g., Carney v. American University*, 151 F.3d 1090, 1096 (D.C. Cir. 1998); *Byrd v. MacPapers, Inc.*, 961 F.2d 157, 159 (11th Cir. 1992). *See also Hamilton v. Spraying Systems, Inc.*, 2004 WL 2191330, at *7-8 (N.D. Ill. 2004) (rejecting as "fundamentally flawed" the idea that 42 U.S.C. § 2000e-5(e)(1) can be construed to run from the date of the protected employment activity, rather than the retaliatory act). Nevertheless, it is appropriate for this Court to take into account these sometimes dramatic reductions in the length of the limitations periods applicable to FCA anti-retaliation claims. While it is true that the court of appeals' decision would give some employees more time to file from the retaliatory act and others less, if this Court believes that far more whistleblowers would benefit than be harmed by the court of appeals' interpretation, that is a consideration this Court may properly weigh in evaluating this "fairness" factor.

C. Statutes of Limitations Should be Predictable

NWI also submits that statutes of limitations should be interpreted in a manner that promotes predictability.

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[5] This six-year length of time does not differ markedly from Illinois' five-year statute of limitations for wrongful discharges, which was discussed in *Neal v. Honeywell, Inc.*, 33 F.3d 860, 861-62 (7th Cir. 1994).

The court of appeals obviously considered this factor, adopting Judge Easterbrook's belief that it is "easier to determine the date of a false claim than to pin down the time of retaliatory acts," since "the claim is a document." *Wilson*, 367 F.3d at 251 (citing *Neal*, 33 F.3d at 865). This Court should give due consideration to the court of appeals' beliefs in this regard. It is certainly true that "arguments about retaliation [may] depend on oral exchanges and are subject to failure of memory as well as the risk of prevarication." *Id.* at 251 (citing *Neal*, 33 F.3d at 865). On the other hand, it also must be noted that this conclusion is based on a presupposition that the retaliation is easily linked to a particular false claim. Often, however, whistleblowers will report on a number of alleged false claims – sometimes even hundreds or thousands, potentially covering a period of many months or even years. In evaluating this factor, then, this Court should properly consider the broader concepts of predictability that inevitably may come into play: Which false claim will be the one to which retaliation against an employee is "tethered"? Can an employer openly admit FCA retaliation but then assert that the retaliation was based on the employee's disclosure of a false claim beyond the limitations window, rather than more recent false claims, thereby avoiding liability altogether? How would an employee go about "linking" the employer's retaliation to the disclosure of one particular false claim or set of claims instead of another? What will happen if a jury decides the retaliation was based on false claims that are both within and outside the limitations window – will the damages award be allocated and split? If so, how? What if the retaliation is clear but it is based (as

may typically be the case) on the general fact of disclosure to the government, with no real way to break down the issue further – is an employee out of luck? What if only the earlier claims beyond the six-year window are ultimately "found" to be false? Already, this view of § 3731(b) has led to a rather remarkable scenario in one court where, even after the filing of a complaint, neither side's counsel was able to tell the court when the statute of limitations expired. *See United States ex rel. Tillson v. Lockheed Martin Energy Systems, Inc.*, 2004 WL 2403114, at *16 (W.D. Ky. 2004) ("At the hearing, counsel for both parties indicated that the exact date of SAIC's alleged § 3729 violation on which Tillson's retaliation claim is based is not known at the present time."). Starting the limitations period for a retaliation claim at the point in time of the § 3729 violation may do little, if anything, to make it easier to determine the limitations period in particular cases. This Court should evaluate whether Congress intended, in § 3730(h) or elsewhere, to add these complexities to the anti-retaliation limitations equation, or to impose this burden on employee whistleblowers. *See* S. Rep. No. 99-345, at 1-2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5267 (Congressional intent in amending FCA included goal "to encourage any individual knowing of Government fraud to bring that information forward."). If § 3730(h) is best read as a statute designed to prevent retaliation against FCA whistleblowers generally, this Court may wish to carefully consider, in evaluating predictability, whether it is wise to create a process in which courts would be required to perform the difficult task of trying

to link and allocate retaliation to a particular underlying false claim.

On the other hand, an interpretation of the FCA that requires whistleblowers to utilize the most analogous state statute of limitation may create uncertainty and choice of law questions of its own, raising countervailing predictability issues. NWI submits that this Court should carefully weigh all of these various factors in reaching its ultimate conclusion.

D. Statutes of Limitations Should Have a Positive Practical Impact

Finally, NWI submits that statutes of limitations should be interpreted in a manner that promotes the underlying policy goals of the substantive laws to which they are being applied. In this case, this Court should consider whether the court of appeals' decision will enhance or undermine the FCA process itself. In this regard, this Court must necessarily consider whether employees will be progressively discouraged from coming forward with potentially important information to the government as the statute of limitations on the underlying false claim approaches. This is not an idle concern, for "the discovery of false claims, predicated on deceptive practices, may not occur until late in the day." *Id.* at 261 (Wilkinson, J., dissenting). A new employee who starts with a company and uncovers a fraud 4-5 years old, for example, would face a very real dilemma – with a risk of retaliation without recourse if he or she comes forward. *See Truong*, 1991 WL 496831, at *1 (noting this "rather bizarre" result). Or, even on earlier claims, "an employer, and especially one aware of the

majority's limitations rule, could resolve not to 'get mad,' but in the longer run to 'get even.'" *Wilson*, 367 F.3d at 261 (Wilkinson, J., dissenting). It would be wrong to assume that these intricacies of statute of limitations law will be unknown to such employees. Many of the most effective *qui tam* whistleblowers are well-educated corporate managers, and many if not most will likely approach attorneys trained in FCA law before becoming whistleblowers. Those lawyers necessarily will advise their clients of these risks. Under the court of appeals' decision, some employees may choose not to proceed, making it impossible to know how many frauds against the United States never see the light of day.[6] The fact that the court of appeals' decision may result in any number of acts of fraud going undetected is a factor that this Court should factor into its analysis.

The risks that an employee whistleblower often takes in this context should not be minimized. Often, employees with decades of service, sometimes all with

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[6] In her opposition to the petition for a writ of certiorari, Respondent emphasized how no published case had shown that any "absurd" results has yet occurred. Of course, we will never know about the cases that employees perhaps never filed due to concerns that they could not be protected from retaliation because their claims might be time-barred. In any event, the idea that a retaliation may occur long after false claims is far from fanciful. *See, e.g., Childree v. UAP/GA AG Chem, Inc.*, 92 F.3d 1140, 1143 (11th Cir. 1996) (false claims submitted in 1989, employee fired over four years later in 1993, suit filed later still; while the anti-retaliation lawsuit was pending, the plaintiff "concede[d] that the statute of limitations for bringing such a *qui tam* action has now run.").

the same company, place their entire careers on the line. They forever change the nature of their relationship with their employer and also risk the possibility of a broader "blackballing" within their industries at large, even if they leave their company. The court of appeals' suggestion that even a whistleblower who can establish open and willful retaliation by an employer nevertheless may have their claims denied as time-barred (or be left with the mere hope of an "equitable tolling" argument) would not seem to promote the underlying goals of the FCA. This Court should carefully consider whether this is what Congress intended when it expanded the scope of § 3730 to include claims of retaliation.

On the other hand, the Respondent or other *amici* may submit briefs that discuss ways in which the policy goals of the FCA would be enhanced by the court of appeals' decision. Again, NWI believes that all of these factors should also be carefully considered in this equation. At the present time, however, it is not obvious to NWI that Congress would save this special treatment, and this unusual construction of a statute of limitations, for employers "who first defrauded the government and then moved against the very persons who brought that fraud to light." *Id.* at 259 (Wilkinson, J., dissenting).

In sum, NWI asks this Court to adopt and carefully evaluate the four underlying core principles that it believes should underlie any evaluation of statutes of limitations, fully examining all relevant facts and rendering a decision that will best promote those goals. In this manner, NWI submits that the Court will better promote human rights in the workplace.

CONCLUSION

For the foregoing reasons, the National Workrights Institute takes no position on the merits of this case. There are many facts and factors to which NWI is not privy. Nevertheless, NWI encourages this Court to interpret the statute of limitations for anti-retaliation claims under the False Claims Act – and all other statutes of limitations – with an eye toward promoting their underlying goals of conceptual reasonableness, fairness, predictability, and a positive practical impact.

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